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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 313.

GEORGE W. GREEN ET AL., PETITIONERS,
VS.
CITY OF STUART, FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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CITY OF STUART, FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioners George W. Green, Newport Culvert Company, a Kentucky Corporation, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser, Mary M. Gosling and George W. Van Slyck, as executor of the estate of B. N. Douglass, deceased, severally petition for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a final judgment entered by said court on April 29th, 1943, affirming final judgment of the United States District Court for the Southern District of Florida, petition for rehearing in said Circuit Court of Appeals having been denied May 31st, 1943. The opinion and judgment of said Fifth Circuit Court of Appeals is reported as *Green et al.* v. *City of Stuart*, 135 F. 2d 33. Petitioners in support of this their petition respectfully further show unto the court:

STATEMENT OF MATTERS INVOLVED.

The proceeding in the courts below was a petition by the City of Stuart for the confirmation of a plan of composition of part of its debts in alleged pursuance of Chapter 9 of the Bankruptcy Act, 11 U. S. C. A., Secs. 401 to 403. The city's petition (R. 9) attempted to present a plan for the composition of debts

"which it desires to affect by such plan."

The proposal therefore was a restrictive plan which, as we shall later see, was for the benefit of the "inside few." The "plan" was identified as "Exhibit A" to the petition. A description of the debts to be affected as "Exhibit B." A list of consenting creditors as "Exhibit C" and an alleged list of all known creditors as "Exhibit D." The petition alleged that the plan was fair and equitable. That, if affirmed, taxpayers would be able to pay the amounts levied to service the proposed refunding bonds and that the petition was filed in good faith.

The plan "Exhibit A" beginning R. 13 described the debts to be affected as (1) all outstanding bonds. (2) All accrued and unpaid interest on the bonds. (3) All judgments or which *ad valorem* taxes had to be levied. All the bonds described in the plan were however not of the same class because a large part thereof constituted street improvement bonds based on statutes such as Chapter 6864, Laws of Florida, 1915, Sec. 3016, C. G. L., and Chapter 9298, Laws of Florida, 1923, Secs. 3022, *et seq.*, C. G. L., providing for special assessment funds to liquidate such bonds in addition to making them general obligations of the city.

Section 2 of the plan pledged the full faith and credit of the city and a "sufficient *ad valorem* tax to provide therefor on all property within said city subject to taxation." No showing is made either by the petition or the

plan as to what was considered property within the city subject to taxation as a result of the decision of the Supreme Court of Florida in the case of *State ex rel. Davis* v. *City of Stuart,* 97 Fla. 69, 120 So. 335. The record in the companion case of *Selser* v. *City of Stuart,* now before the court on petition for certiorari and reported 135 F. 2d 211, shows that the city officers did not know and do not know what property is legally within the city and subject to taxation.

Section 3 of the plan provided for exchanging old bonds for refunding bonds par for par. Also to issue new refunding bonds for accrued interest which had accumulated during a period of about 16 years default. Thus the face amount of the proposed refunding bonds was to greatly exceed the face amount of the outstanding bonds and bonds issued for accrued interest would draw interest, whereas coupons representing past due interest did not draw such interest.

Section 4 of the plan provided for a rapidly ascending scale of interest rates starting at 1% up to 5% but that section of the plan has to be considered with Section 6(F) (R. 18) where it is provided that

> "in the event of a failure or refusal of the governing authorities of the city to perform any of the obligations assumed hereunder * * * or upon a default in the payment of interest on said refunding bonds"

then at the option of the holders of 25% in amount of outstanding refunding bonds interest rates would all revert to the original 6% basis. Such defaults were inevitable for a city which had not been able to pay any interest for 16 years and whose indebtedness was not being decreased.

Section 6 of the plan (beginning R. 16) undertook to bind the city with sundry obligations providing generally for the prompt and exclusive payment of the proposed refunding bonds. Subsection (B) set out the scale of

budgetary levies for respective periods and for the optional use of $10,000 per year from sources other than *ad valorem* taxes.

Section 7 of the plan made it mandatory on the part of the city to use and absorb all surplus funds it might obtain for the purchase of refunding bonds to be issued pursuant to the plan.

Section 8(A) of the plan (R. 21) provided that all delinquent taxes and all delinquent special assessments for the year 1941 and prior years might be settled and adjusted on any basis approved by the city and that the proceeds of such settlements:

> "shall be paid into a special fund which will not be amenable to any execution by any creditor of the city"

but will be used by the city for improvements or

> "for the purpose of purchasing refunding bonds"

at specified percentages for four successive six-months periods. Subsection (B) of Section 8 of the plan then provided that the right to tender refunding bonds was open to all creditors meaning of course creditors who held refunding bonds and that to insure a supply of refunding bonds sufficient to absorb the proceeds of settled delinquent taxes and special assessments Thomas M. Cook & Company (later shown to be merely an individual and fiscal agent for the city) would make available not to exceed $100,000 of refunding bonds for such purposes. Such diversion of delinquent taxes and delinquent special assessments to the exclusive benefit of refunding bonds to be issued under the plan created a gross inequality as applied to other creditors equally entitled to payment from that source directly contrary to the principles announced by this court in the *Avon Park case*, 311 U. S. 158, 136 A. L. R. 870.

Paragraph 9 of the plan (R. 22) set forth that Thomas M. Cook & Company, not incorporated, was a bond investment firm and creditor of the city and that he

> "has agreed with the City to render such technical and other services, and to advance funds necessary to consummate the following steps incidental to the refunding program."

The things Cook was to do are then listed as 1 to 8 inclusive. All this he was to do "at no expense to the city" but he was to be reimbursed

> "by receiving from creditors exchanging refunding bonds hereunder a sum of Twenty ($20) Dollars per $1,000 Refunding Bond delivered."

Section 8(B), page R. 22, recited that said Cook was to make available $100,000 of refunding bonds, thus indicating the extent to which he was already the owner of outstanding bonds and a creditor of the city in that behalf. Therefore Section 9 of the plan proposed to give Cook who was to render all the supposed services the inside advantage by allowing him to charge other creditors $20 a thousand on their bonds exchanged. Thus again the plan violated the principles laid down in the Avon Park case.

Exhibit C, alleged (R. 10) to be a list of consenting creditors to petitioner's plan appears (R. 26 to 64). That list included American Surety Company (R. 26), a judgment creditor, for $15,860.68. Also M. J. Bowerman (R. 30-31), a judgment creditor, for $29,307.17. Also R. E. Crummer (R. 32 to 36), a holder of all classes of bonds issued by the city including street improvement bonds issued under Chapter 6865, Laws of Florida, 1915, and issued under Chapter 9298, Laws of Florida, 1923, aggregating for principal $187,500, for coupons $64,390 and for other interest $21,914.49, totalling $274,059.49. Also R. E. Crummer & Company (R. 38-39), a holder of bonds and coupons for $56,548.32. Also J. Leo Gleason (R. 43 to 46), coupons $40,860 and coupons $15,570. Also E. W. Jackson (49-50),

bonds $70,500, coupons $35,678.69, other interests $2,570, totalling $108,748.69.

Exhibit D, alleged in the petition (R. 10) to be a list of "all known creditors" of the city, appears R. 65 to 75. That list includes (R. 65) American Surety Company as a judgment creditor. Also M. J. Bowerman as a judgment creditor. But the list does not include the petitioner Green as a creditor nor does it include sundry other creditors then suing the city as shown by the city's application for temporary injunction against pending actions (R. 209-210).

Petitioner George W. Green filed his claim (R. 83 to 85) setting up a general indebtedness against the city in the sum of $29,168.06. That said indebtedness had been ratified by the city under resolution of March 1st, 1929, and was then ratified by the Legislature by the passage of Chapter 14407, Laws of Florida, 1929, and was then ratified by the decision of the Fifth Circuit Court of Appeals in the case of *Green* v. *City of Stuart*, reported 81 F. 2d 968. That decision was rendered in March, 1936. Thus the unequivocal showing made by the claim is that the indebtedness due to petitioner Green was a general obligation of the city entitling him to the levy of general *ad valorem* taxes to liquidate the same. Green then filed a set of interrogatories addressed to the Mayor of the City of Stuart (R. 87 to 91) seeking to develop relations between the city and Thomas M. Cook mentioned in the petition for composition. On the same day petitioner Green filed his answer (R. 92 to 108) challenging the petition for composition in many respects. First, that the petition did not plead the conditions precedent required by 11 U. S. C. A., Sec. 403. Second, that the plan submitted by the city was in fact a plan of its fiscal agent Thomas M. Cook "or his relative R. E. Crummer." Third, that the list attached to the petition did not include the claim of defendant Green or the claims of many other creditors of the city. Fourth, that 62% of the creditors had not accepted the plan if securities owned or controlled by the city or

its fiscal agent be excluded. Sixth, that the plan was not fair and equitable either to creditors or taxpayers and that the city would not be able to service the new securities if issued. Seventh, that the plan was not in good faith.

It is then shown in paragraph VIII that the city authorities had previously adopted a plan, copy of which is attached as Exhibit A to the answer.

> "That one R. E. Crummer was attempting through his relative Thomas M. Cook, to be fiscal agent for said petitioner and that said Cook represented to said committee (for the prior plan, Exhibit A) that he owned or controlled more than 50% of outstanding indebtedness of the petitioner."

In short that Cook and Crummer and Crummer's company R. E. Crummer & Company, interfered and prevented the carrying out of the prior plan worked out by a committee of representative citizens which would have resulted in a composition of the city's debts for the sum of $500,000 less than under the Cook-Crummer plan set up in the city's petition for composition. Besides which the pretended fiscal agent Cook was being allowed to earn a large fee from other creditors whose debts were to be refunded.

In paragraph C of Section VIII of the same answer (R. 95-96) it is further pointed out that the Selser suit was pending to determine what lands might be liable for taxes to liquidate the proposed new bonds and that unless the larger territory could be subjected to such obligations the new obligations would soon again be in default and put the city at the mercy of the fiscal agent and his relative Crummer. That no reason existed why the fiscal agent Cook should be allowed to speculate on the obligations of the city or be allowed to charge other creditors large fees for making exchange of bonds. Also that no reason was shown why the city should issue new securities for a half million dollars more in amount than un-

der a prior acceptable plan. Copy of the prior acceptable plan is then attached as Exhibit A (R. 98 to 109).

The petitioner Newport Culvert Company filed its claim as a creditor to the extent of $17,212.46 (R. 110 to 126) showing that it also was entitled to have the city pay the same from a general levy of *ad valorem* taxes. Answer of the same company was filed (R. 127 to 132) challenging the petition of the city in sundry respects similar to answer of Green.

Petitioner Robert M. Turner filed a petition to intervene as a taxpayer owning property within the city proper (R. 134 to 137) claiming that the proposed city plan would not be fair and equitable to taxpayers such as he.

Counsel for these several creditors and tax payers on July 25th, 1942, filed a set of interrogatories addressed to Thomas M. Cook, fiscal agent, and from those interrogatories information was sought as to whether J. Leo Gleason and E. W. Jackson were employees of said Thomas M. Cook, fiscal agent. These were very material inquiries because those two parties claimed to own large amounts of coupons and bonds and they were listed as alleged assenting creditors. The interrogatories also sought to develop the relations between Cook and Crummer and between Cook and R. E. Crummer & Company. Counsel for the city moved to strike the claim and answer of petitioner Green (R. 144). Likewise they moved to strike the claim of Newport Culvert Company and its answer (R. 146). Also to strike the petition and answer of Robert E. Turner (R. 148). No notice however was ever given to Carroll Dunscombe, attorney of record for those parties of any hearing upon those motions to strike. Prior thereto the court had made an order on June 18th, 1942 (R. 76 to 79), providing for the hearing on the petition of the city October 5th, 1942, and directing publication of notice. At R. 83 is an affidavit by the city clerk to the effect that the notice defined by the order (R. 79) was

mailed to creditors. Then a motion was made (R. 81) to change the return date to September 14th and an order was made to that effect (R. 82). The place for the return was designated as Miami, Florida. Nevertheless an *ex parte* hearing without notice was held before the Honorable William J. Barker, Judge of the Tampa Division, at Tampa, Florida, on the 18th day of September, 1942, at which time and place he made the interlocutory decree now appearing R. 155 to 163 which struck the claim and answer of petitioner Green, the claim and answer of Newport Culvert Company, the petition and answer of Robert M. Turner and the basis of the order was that the claims of said parties are not materially affected by the plan of composition. The order then proceeds (R. 156, 157) to say that the court had considered evidence and had examined contracts, proposals and what not, and then makes "findings of fact." The only matters in the record as constituting any sort of evidence was an *ex parte* affidavit of L. B. Eurit (R. 150, 152) as city clerk, sworn to September 16th, 1942, and filed September 18th, 1942, undertaking to state certain facts as to the indebtedness of the city and its tax assessed valuations. Also an *ex parte* affidavit by Thomas M. Cook (R. 152 to 155) sworn to September 16th, 1942, and filed September 18th, 1942. So it is that all of the claims and answers filed by the petitioners up to that time were swept out and none of the interrogatories propounded to Cook were answered and the court proceeded to enter up a decree upon said *ex parte* affidavits of the said clerk and of the fiscal agent Cook. The findings of fact among other things (R. 158) stated:

> "None of the claims owned, held or controlled by Thomas M. Cook & Company, *which have been voted in the plan*, are controlled by the petitioner within the meaning of the Bankruptcy Act" (Italics ours).

Cook was not listed by the city's petition as being a creditor, yet the decree finds that he voted claims for the plan.

Paragraph K of the findings (R. 159 to 160) recites that Cook was a creditor of the city and had made a guarantee of $100,000 of bonds which might be available for purchase by the city. Yet in the same paragraph it was found that Cook was to be allowed a fee of 2% or $20 on each $1,000 of bonds exchanged by other creditors for ratable portions of outstanding bonds. In other words, Cook as the fiscal agent and as a creditor was to be given that advantage over other creditors. Paragraph F (R. 161) found that none of the claims owned, held or controlled by Cook

> "which have voted in the plan are controlled by the petition within the meaning of the Bankruptcy Act."

After the entry of the *ex parte* decree above mentioned petitioner A. T. Van Tassel on October 9th, 1942, filed a petition for leave to intervene (See his petition, R. 163 to 169). That petition set up that Van Tassel was a resident taxpayer and that it was illegal for the commissioners to delegate their authorities to a fiscal agent such as Thomas M. Cook. He also insisted that the composition plan as per copy attached to the former answer of George W. Green was much more favorable to taxpayers and had been consented to by two-thirds of the *bona fide* creditors affected. It is also set up (R. 164) that after that plan was so consented to the city commission entered into a void contract with Thomas M. Cook trading as Thomas M. Cook & Company

> "and who in fact is a representative of R. E. Crummer & Company, a foreign corporation that speculates in defaulted municipal bonds."

Copy of the fiscal agency contract is then attached as part of the petition. It is then set up that the contract was not disclosed to the court as required by law. The *ex parte* affidavit of Cook filed at Tampa September 18th, 1942 (R. 153), referred to his contract as Exhibit 1, being attached to the affidavit, but the affidavit as copied in

the record carried no copy of the contract. Therefore it was put into the record as part of the petition of Van Tassel. The Van Tassel petition (R. 164) then charges that the fiscal agency contract included all the vices condemned by this court in the Avon Park case. It is then charged

> "That the bulk of the consents filed to this plan are those of the fiscal agent or controlled by him or R. E. Crummer & Company."

It is thus specifically charged that the fiscal agency contract made with Thomas M. Cook was a subterfuge on the part of R. E. Crummer & Company to get round some of the restrictions defined by this court in the Avon Park case. Numerous other objections to the contract are pointed out in sections 8 to 11 of the Van Tassel petition and same was sworn to by Carroll Dunscombe as attorney for Van Tassel.

The fiscal agency contract was embodied in resolution No. 293 passed by the city commission and it appears R. 167 to 177. Many of the features of the agency contract are the same as the proposed plan identified as Exhibit A to the petition, so much so that we must infer that the fiscal agent and his kinsman R. E. Crummer were the authors of the plan proposed to the court. Section 5 of the contract (R. 170-171) includes practically the whole of section D of the plan (R. 16-17), but it carries also another very significant sentence not found in the plan. See sentence beginning middle R. 171 which provides that the city shall from the first moneys collected out of the levy for the refunding bonds set aside sufficient moneys for the payment of interest on refunding bonds and that the sinking fund so created

> "for said issue of refunding bonds shall be kept separate and shall not be co-mingled with other funds."

This was an effort to ear-mark all of the funds that might come in from the annual levies made to service the re-

funding bonds. The scheme was to create a preference in favor of the refunding bonds to the exclusion of other creditors because, as the petition of Van Tassel and other interveners showed, the city would not have the ability to carry the load for the refunding bonds much less for other creditors.

A part of section 3 of the contract (R. 172) is substantially the same as section F of the plan (R. 18) providing that on failure to perform any of the obligations assumed by the city to holders of refunding bonds or upon default in the payment of interest then the holders of 25% in the principal amount of refunding bonds should have the option to such holders respectively to cause the interest on their bonds to revert to the original rate of 6%. This would in effect give Cook and Crummer absolute domination over the fiscal affairs of the city because they held more than the requisite 25%.

Section 7 of the agency contract (R. 173-174) specifically authorized Cook

> "to buy and sell bonds and coupons of the City of Stuart, Florida, or judgments rendered thereon, all of which might be the subject of this proceeding, at any time satisfactory to the first party (Cook) and to the holders of such above mentioned obligations."

Cook is then authorized to extend to the holders of such obligations the right

> "to voluntarily sell all or any part of their past due coupons or claims for past due interest"

to Cook at 25% of par. In the same section the city is given the option for a period of 30 days to buy what Cook may thus acquire on the same basis, namely 25%, but Cook well knew that the city, then in default for 15 years on the payment of interest, would have no funds with which to exercise the option unless the city secured them through the adjustments of delinquent taxes as per

section 10 of the contract (R. 175) and adjustments of special assessments as per section 8-A of the plan (R. 21). Therefore the contract boldly undertook to vest in Cook, the fiscal agent of the city, the right to speculate in the city's debts, all of which was directly contrary to the decision of this court in the Avon Park case. Such specific authority to speculate in the obligations of the city did not appear in the proposed plan attached to the city's petition for composition. The interlocutory decree as we have seen specifically finds in paragraphs (e) and (k) (R. 158-159) that Cook was a large creditor of the city and voted his claims for the plan. Therefore the provisions of section 7 of the agency contract (R. 173-174) gave Cook a very large advantage not accorded to any other creditor. According to the petition of Van Tassel (R. 164) he had obtained that sort of a contract as the representative of R. E. Crummer & Company.

Section 8 of the contract (R. 174-175) obligates Cook to furnish the legal service of Joseph P. Lea, Jr. Mr. Lea was then and still is general counsel for R. E. Crummer & Company with headquarters at Orlando, Florida. Section 9 of the contract (R. 175) gives Cook the right to charge other bondholders such amounts as he and such other bondholders may be able to agree upon for the privilege of exchanging their old bonds for new bonds. In the plan attached to the city's petition (R. 23) the amount he was to charge was reduced to the definite sum of $20 per $1,000 or 2%. This was another advantage accorded to Mr. Cook and his principal R. E. Crummer & Company not accorded to other bondholders.

Section 10 of the contract (bottom R. 175) is in part the same as the plan defined by Section 8(A) (R. 21), namely that the city was to make such settlements on delinquent taxes for the years 1941 and preceding years, also delinquent special assessments, and thereby create a special fund for the specific purpose of purchasing re-

funding bonds from Cook and Crummer at specified percentages of par on an ascending scale—more special benefits. This scheme would operate to deprive general creditors of the town such as the petitioner Green of sharing in those assets as a means of satisfying their just general obligations against the city.

Section 11 of the contract (R. 176) undertakes to vest in Cook the authority to proceed with the formulation of a plan of composition and to proceed in the federal bankruptcy court and pay all costs and master's fees that might be incurred by the city. That section therefore clearly demonstrates that the plan proposed by the city was the Cook plan and not the city's plan. The fiscal agency contract plus other matters previously referred to clearly demonstrate that the city commissioners in effect "sold out" to Cook and Crummer. These are some of the things which intervening creditors and intervening taxpayers sought to show before the court.

On October 15th, 1942, as appears R. 178 to 183, counsel for Green, Turner and Newport Culvert Company moved to vacate the interlocutory decree of September 18th, 1942, on numerous grounds. Prior thereto on July 2nd, 1942, as appears R. 200. Pauline A. Selser, a taxpayer, had filed a petition showing that she had a suit pending for declaratory judgment to determine what property was subject to taxes by the City of Stuart and that the court should determine that matter before concluding the consideration of the petition for composition. On October 16th, 1942, all of the undisposed of motions and petitions came on to be considered by the court and a further decree was entered (R. 186 to 188) denying the petition of Green *et al.*, to vacate the former interlocutory decree of September 18th, and denying interrogatories propounded to Cook, denying intervention to Van Tassel, Selser and others on the ground that

> "such persons are not in any manner affected by this plan of composition, and that such persons do not

> own securities affected by this plan of composition and therefore are strangers to this proceeding and have no right to be heard herein, and that some of such persons are taxpayers and therefore have no right to intervene in this cause."

That particular order cleaned up the whole record leaving the city and Mr. Cook to complete the job as they saw fit without any interference by taxpayers or creditors who had not been listed as consenting creditors to the plan.

On the same date the court entered the final decree appearing R. 188-189 confirming the plan which had been proposed by the city and making it binding upon

> "all persons or corporations holding any of such bonds, coupons, or interest accruals thereon, or any claims thereon, however represented."

Appeal was taken from the interlocutory decree and final decree as appears R. 190-191. The Circuit Court of Appeals affirmed the decision of the court below as now appears by the report of *Green* v. *City of Stuart*, 135 F. 2d 33. The Court of Appeals agreed with the district court to the effect that although petitioners George W. Green and Newport Culvert Company were general creditors of the city they were not affected by the composition plan and therefore were not entitled to be heard. The Court of Appeals agreed also that neither taxpayers within the city proper nor those within the territory which had been excluded by the decisions of the Supreme Court of Florida, had any right to be heard. That they were not proper parties and therefore the district court correctly struck out and denied their petitions of intervention.

BASIS OF JURISDICTION.

The jurisdiction of this court is based upon Section 240, Judicial Code, Sec. 347, Title 28, U. S. C. A. Also upon Rule 38 of this court. Also upon 11 U. S. C. A., Sec. 47(c) (Pocket Supp., p. 175).

QUESTIONS PRESENTED.

QUESTION I.

Were Petitioners George W. Green and Newport Culvert Company Such Creditors of the City of Stuart As Were Severally Affected by the "Plan" of Composition Proposed by the City and Were They Severally Entitled to Contest the Material Allegations of the City's Petition for Confirmation of Such "Plan"?

We maintain that the courts below erred in answering this question in the negative. Chapter 14470, Laws of Florida, 1929, not only validated Green's claim against the city but declared that he was entitled to have same paid by general *ad valorem* taxes levied by the city. The Fifth Circuit Court of Appeals also upheld Green's claim and cited the Act of 1929 as authority. See *Green* v. *City of Stuart*, 81 F. 2d 968. The debt due to Newport Culvert Company, as described in its filed claim and answer, is of the same dignity. These two creditors are admittedly entitled to have the obligations they hold liquidated from the "same source or sources" as the bonds and judgments alleged to be affected by the plan. Therefore 11 U. S. C. A., Sec. 403(b) (Pocket Supp., pp. 87-88), gave them the specific right to file such claims and answers as they did file in this cause. It follows that the courts below erred in striking those claims and answers from the file and in denying them all right to be heard in this proceeding.

It has been held that all claims of creditors must be filed whether listed or not and whether liquidated or not.

Otherwise such claims will be barred by a composition decree. *Poinsett Lbr. & Mfg. Co.* v. *Drainage Dist. No. 7 of Poinsett County,* (8 C. C. A.) 119 F. 2d 270. 11 U. S. C. A., Sec. 403(a), mandatorily requires that

> "there shall be filed with the petition a list of all known creditors of the petitioner, together with their addresses so far as known to the petitioner, and a description of their respective securities."

Subsection (b) of the same section provides for a notice to all creditors. Subsection (e) of the same section defines the mandatory essentials for confirmation of the plan. First, that it must be fair and equitable and non-discriminatory as between creditors. That it had been accepted and approved by the requisite percentage of qualified creditors. That there have been no fraudulent practices and no bad faith and, lastly, that the petitioner

> "is authorized by law to take all action necessary to be taken by it to carry out the plan."

If any creditor of any class can point out any illegality in the proposed plan which would affect directly or indirectly his right or ability to have his debt liquidated then he is entitled to be heard.

QUESTION II.

Were George W. Green, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser et al., As Taxpayers, Some Within the Original Corporate Limits of the City and Some Within the Extended But Illegal Limits of the City, Severally Entitled to Intervene and Show That the "Plan" Because of Its Bad Faith, Its Unfairness, Its Waste of Public Funds and Its Illegalities Should Not Be Confirmed?

Both courts below answered this question in the negative.

It has long been settled that a taxpayer is entitled to equitable relief against corporate authorities to prevent waste of corporate assets or abuse of corporate power or

the making of illegal corporate contracts. *Crampton* v. *Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070. General Bankruptcy Order No. 37, 11 U. S. C. A., Sec. 53, p. 96, makes the Rules of Civil Procedure appliable in bankruptcy cases, Rule 24 entitled the taxpayers last above mentioned severally to intervene and point out the bad faith, unfairness, waste of public funds and illegalities which they severally have alleged in their petitions. *In re Willacy County, etc., District No. 1,* (D. C. Tex.) 36 Fed. Supp. 36. *Seaboard Terminals Corp.* v. *Western Maryland Ry. Co.*, 108 F. 2d 911, 42 Am Bankr. Rep. (N. S.) 106.

QUESTION III.

Was the Plan "Fair and Equitable" Either to Creditors Such As Green et al. or Taxpayers Such As Turner et al., When It Was Shown by the Answer of Green (R. 95) **That the Citizens' Committee Plan** (R. 98 to 108) **Would Have Accomplished a Refunding of the City's Debts for $500,000 Less Than the Cook-Crummer Plan** (R. 13-33)?

The answer of Green (R. 93) denies that the plan referred to in the city's petition was "fair and equitable" to him either as a creditor or a taxpayer and at R. 95 he charges that the proposed city plan will bring about an excess indebtedness of $500,000 more than the citizens' committee plan. The answer of Turner (Par. 4, R. 136) charges that the city has no ability to pay and perform. That the proposed plan will merely facilitate speculation by the fiscal agent Cook and prolong the city's defaults with a resultant depreciation of property values. The petition of Van Tassel (R. 165-167) also alleges that the plan would result in the levy of heavier taxes than had been collectible in the past and that the city had no present or prospective ability to pay according to the proposed plan. Also that

> "the plan is not fair to the taxpayers or its *bona fide* creditors, but only to provide a means whereby specu-

lators in its defaulted obligations and its fiscal agent can make a profit with no idea that the plan will succeed or stay out of default if confirmed."

The motions attacking these several answers admitted the truth thereof. Undoubtedly $500,000 difference in the debt burden to be carried materially affected all taxpayers. Such great difference in the two plans also lessened the ability to pay such creditors as Green and Newport Culvert Company. What justification can there be for such invasion of the rights of creditors and taxpayers for the benefit of speculators such as Cook and Crummer?

QUESTION IV.

Was the City "Authorized by Law to Take All the Action Necessary to Be Taken by It to Carry Out the Plan" When That Plan Was Contrary to Many Limitations of the City's Existing Charter?

The courts below and this court can take judicial notice of the city's charter so that it was not necessary to plead or prove the same, especially when its charter is represented by a special statute of the state.

The original statutory charter of the "Town of Stuart" was Chapter 7245, Laws of Florida, 1915. In 1925 Chapter 11214 was passed abolishing the Town of Stuart and purporting to create the "City of Stuart." Section 162 of that Act carried a referendum provision to the effect that same would go into effect upon majority vote of freeholders. There is some doubt as to whether a freeholders' election was properly called and held due to the decision of the Supreme Court of Florida in *State ex rel. Davis v. City of Stuart*, 97 Fla. 69, 120 So. 335, but irrespective of that question the court held that all territory embraced by the Acts of 1925 and within the City of Stuart lying north of St. Lucie River and harbor were unconstitutionally included within the city. By Chapter 11749, Laws of Florida, special session, November, 1925, the Legislature

undertook to validate $500,000 of bonds of the City of Stuart issued for specified purposes. Those are the same bonds involved in the proposed composition. Therefore provisions of the charter acts in force when the aforesaid bonds were issued became parts of the bond contracts.

In 1933 the Legislature passed Chapter 16692 abolishing the existing municipality of the "City of Stuart" and creating a new municipality of the same name, defining its boundaries and its powers. The result is that the Acts of 1933 plus the Act of 1925 will have to be examined to see whether or not the proposed plan runs counter to any prohibitions contained in said Acts. We think that the provisions of section 158 of said Chapter 16692 are fatal to the proposed composition plan here involved. That section of the Charter reads as follows:

> "Section 158. How issued—The City Commission, in its corporate capacity, is authorized to issue from time to time, bonds of said City, of such denomination and bearing such rate of interest, not exceeding six per cent, and becoming due in such time and upon such conditions as may be determined, *to an amount not exceeding in the aggregate fifteen per cent of the assessed value of the taxable real estate of the City at the time of issue;* provided, that no such bonds shall be issued except for the purpose indicated in Section 7-B, for the floating of the debt of the City, *refunding of previous issues of bonds,* establishment of public work and utilities, construction of necessary municipal buildings, and for the improvement of parks, highways and streets, and other municipal purposes as are of general benefit in their relation to the municipality; provided, further, that before the issue of any such bonds shall be made *an ordinance shall be passed expressing in exact terms the amount of the contemplated bond issue and the purpose for which moneys so to be realized are to be used,* which said ordinance proposing the issue of bonds *shall subsequently be approved by a majority vote of the electors of the City,* who are qualified to vote as shown by the registration and tax books of the

City, who vote thereon, at an election held for that purpose, at such time and in such manner as may be prescribed by law and the City ordinances. *No person shall be demed qualified to vote at such election who does not own and pay taxes on real property located in the City.* The question of the issuance of bonds for any specified purpose may be submitted from time to time not oftener than once each year with relation to each purpose specified" (Italics ours).

Section 206 of the charter act of 1933 makes the general laws of the State applicable

"which are not in conflict with the provisions of this Act."

The general refunding Act of 1931 is relied upon and mentioned in the proposed plan. Nevertheless the charter Act of 1933 is later in point of time and being a special act would control where in conflict with the general laws. *City of Apalachicola* v. *State,* 93 Fla. 921, 112 So. 618. The italicized portions of the foregoing section 158 are important. The record here shows a proposal to refund bonds to the amount of $1,107,000, whereas the assessed value of all taxable property in the city according to the *ex parte* affidavit of the City Clerk (R. 150-152) was $1,754,423. The 15% limitation, according to the language of section 158, applies in express terms to

"refunding of previous issues of bonds."

Other limitations contained in the above quoted section are that an ordinance shall have been passed by the city commission expressing in exact terms the amount of the contemplated bond issue and the purpose for which moneys so to be realized are to be issued. The petition for the composition fails to show the passage of any such ordinance. Another limitation is that the proposed issue of bonds shall have been approved by a majority vote of resident taxpayers owning and paying taxes on real property located in the city. This limitation also applies to

the issuance of refunding bonds and the petition for composition wholly fails to show that any such condition was complied with. The Bankruptcy Act, 11 U. S. C. A., Sec. 403(e)(6), is merely an enabling act extending the benefit of bankruptcy to public utilities and does not purport to create power in any municipality where not existing under local law. Section 158 of the present city charter was included in the charter for the benefit of taxpayers generally, yet all of the answers and petitions of taxpayers were summarily stricken by the courts below.

QUESTION V.

Was the City "Authorized by Law" to Carry Out the Plan When the Provisions of Section 8 of the Plan (R. 21-22) **Violated Sundry Sections of the City's Charter of 1925 and of the City's Charter of 1933?**

Sections 110, 111, 112 and 113 of Chapter 11214, Laws of Florida, 1925, authorized the city to levy special assessments on property specially benefitted for the construction of "sewers, seawalls and drains," "streets," "side walks," and "gutters, etc." Section 119 of said Act provided for the issuance of improvement bonds based on such special assesments in the manner provided for by Chapter 6864, Laws of Florida, 1915—a general act. Chapter 11749, Laws of Florida, special session, November, 1925, shows that the outstanding bonds here in question are in large part such special improvement bonds. Exhibit B to the petition (R. 24-25) shows the same thing. Section 51 of the charter Act of 1925 provides:

> "Sec. 51. Moneys Received on Account of Special Assessments.—All moneys received on account of any special assessment shall be held by the City Treasurer as a special fund from which payment shall be made only on account of the improvement for which such assessment was made or security issued therefor and such money shall be used for no other purpose whatsoever."

The restrictions of this section were for the benefit of general taxpayers and became part of the improvement bond contracts, yet Section 8 of the plan (R. 21, 22) proposes to wholly ignore said charter limitation.

Sections 137 to 157 inclusive of Chapter 16692, the said charter act of 1933, contain provisions for special improvements and the issuing of bonds against special assessments substantially equivalent to the aforesaid provision of the said charter Act of 1925. Section 68 of said charter Act of 1933 was substantially the same as the above quoted Section 51 of the charter Act of 1925. However Exhibit B to the petition (R. 24, 25) shows that none of the bonds here in question were issued after the charter Act of 1933. Therefore we take it that Section 51 of the charter Act of 1925 would control.

In the case of *City of Winter Haven* v. *Summerlin,* 114 Fla. 727, 154 So. 863, 865, the Supreme Court of Florida held that such special assessments constitute a "statutory trust" and that

> "any taxpayer * * * who asserts a beneficial interest in the faithful execution of the statutory trust, may maintain a suit cognizable in equity for an accounting with reference to such statutory trust."

Neither the charter Act of 1925 nor the charter Act of 1933 gave to the city any authority to compromise at will either delinquent taxes or delinquent special assessments nor could the city in the face of Section 51 of the charter Act of 1925 divert special assessment collections either to new improvements or to the purchase of refunding bonds under terms specified in section 8 of the plan. Section 7-B of the charter Act of 1933 provides that general taxes and special assessments shall remain liens

> "against the land assessed until paid."

Also, that no statute of limitations shall apply with respect to the same. Likewise Section 105 of the charter

Act of 1933 provides that taxes and assessments shall remain a lien until paid, yet section 8 of the plan proposes to allow the city to compromise and cancel out both delinquent taxes and special assessments at any price that may be agreed upon between the city and the individual taxpayers and then divert the proceeds to the purchase of refunding bonds from the fiscal agent Cook at prices greatly enhanced over what he paid therefor. According to section 8 of the plan he proposes to sell them back to the city at prices ranging from 35% to 60% of par, whereas it is alleged in the answer of Newport Culvert Company (R. 132)

> "That the fiscal agent in this case is a bond speculator and represents bond speculators. That the alleged creditors he represents in many cases paid 10c flat in nominal sums for their claims, and the real investing creditors have not consented to his plan because they know it will not stand up, that all he wants, and those he represents, is to refund this debt for the greatest amount of paper principal possible with the hope and knowledge it will default after they have unloaded the so called compromise securities on the public, and in order they can again make fees for refunding."

QUESTION VI.

Was the Plan Either "Fair and Equitable" to Petitioning Creditors and Taxpayers or Was the Plan "Authorized" by the City's Charter When It Was Proposed to Convert into Interest-Bearing Bonds All Noninterest-Bearing Coupons and "Other Interest" But to Allow the Holders of 25% in Amount of Refunding Bonds to Cause a Reverter to the Old Interest Rate of 6% upon Any Default by the City Occurring, Such Refunding Bondholders However to Retain All Interest-Bearing New Bonds Issued for Noninterest-Bearing Coupons and "Other Interest"?

The 1925 charter of the city and Chapter 6864 relating to special improvement bonds, adopted thereby, did

not give the city any power to pay interest on bonds after maturity or to pay interest on overdue coupons. Those statutes became part of the bond contracts here involved. In the case of *State ex rel. Fieldhouse* v. *Sewell, Mayor of the City of Miami, et al.*, 126 Fla. 498, 171 So. 298, 9th headnote and supporting text, the Supreme Court of Florida held that mandamus would not be granted to compel levy and assessment of taxes

> "to procure funds with which to pay interest accruing on bonds after maturity * * * the statute under which the bonds were issued does not appear to require payment of interest on the bonds after maturity. Therefore the interest, the payment of which is sought to be provided for, is an item not within the contract and may not be enforced by mandamus."

The Cook-Crummer plan attached to the city's petition provided for the issuance to R. E. Crummer of interest bearing refunding bonds (R. 26) for $64,390 of the past due coupons drawing no interest and $21,914.49 of "other interest," accrued on what we do not know. The plan proposed to do the same thing for all of Mr. Gleason's past due coupons aggregating $66,430 (R. 43-45). The same thing was to be allowed for E. W. Jackson's $35,-679.69 past due coupons and $2,570 "other interest" (see R. 49 to 50). Interrogatories to Cook sought to show that Gleason and Jackson were merely employees of Cook, the fiscal agent, but the court disallowed those interrogatories. Section 6(f) of the plan (R. 18) would give to Cook and Crummer the option on the city's failure to perform any covenant to revert the new bonds to the old interest rate of 6% but no provision was made to surrender any new interest bearing bonds to be issued for noninterest bearing coupons or "other interest." Thus the total debt of the city would be greatly increased rather than compromised. These results would violate Section 158 of the charter of 1933, quoted pages 20-21, *supra*, and would violate Section 6, Article IX, of the Florida Con-

stitution requiring the approving vote of freeholders if there be such increase in the taxing unit's indebtedness. *Taylor* v. *Williams*, 142 Fla. 402, 195 So. 175, 12th and 13th headnotes. *City of Fort Myers* v. *State*, 129 Fla. 166, 176 So. 483, 5th headnote and supporting text.

QUESTION VII.

Was the District Court Authorized to Confirm the Plan Without Any Specific Findings As to the City's Ability to Perform and Carry Out the Plan and Without Any Investigation or Findings As to What Property Was Subject to Taxation, Especially When These Petitioners Had by Their Pleadings Sought to Put Such Matters in Issue?

The courts below answered this question in the affirmative. The district court did so by striking out all the answers and petitions which sought to raise such questions and then proceeded to enter the *ex parte* decree found R. 155 to 163. It will be noted that the decree was signed on the same day that the affidavit of the City Clerk (R. 150) was filed and on the same day that the affidavit of Thomas M. Cook (R. 152) was filed. We apprehend that counsel for R. E. Crummer & Company had previously prepared the decree before the hearing at Tampa on the 18th of September. Be that as it may the decree does not measure up to the requirements of the Bankruptcy Act as expounded by this court in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 520-525, 85 L. Ed. 982, 990, 993, and *Kelley* v. *Everglades Drainage District*, decided June 1st, 1943, 87 L. Ed. (adv.) 1091. Under Question No. V stated page 22, *supra*, we pointed out that all improvement bonds have a special claim and security against special assessments which constitute a "statutory trust." If that security proves to be insufficient, holders of improvement bonds may nevertheless require the city to levy a general *ad valorem* tax to meet such obligations. *Klemm* v. *Davenport*, 100 Fla. 627, 129 So. 904. On the other hand, holders of judgments or other

debts against the city have no such special security and must depend upon their right to compel the city to levy general *ad valorem* taxes for payment of their claims. This presents a situation quite analogous to that involved in the Consolidated Rock Products Company case where one set of bondholders were secured by mortgaged assets and other creditors were not so secured. In the instant case the decree of the district court did not pretend to make any findings as to the value of the uncollected special assessments or to what extent the holders of improvement bonds would have to resort to their general right to require *ad valorem* taxation. Neither was there any attempt to determine or make any finding as to what property of the city was subject to general *ad valorem* taxation. For instance, in 1937 the Legislature passed Chapter 18296, known as the Murphy Act, for the purpose of permitting owners or others to clean up old delinquent state and county taxes. Section 9 of that Act provided that if no affirmative action was taken by owners or others during a two year period defined by the Act then the absolute title to such delinquent lands reverted to the state. The bill for declaratory decree by Pauline A. Selser, one of the intervening petitioners here, showed that had occurred to a large extent in the area claimed to be within the jurisdiction of the City of Stuart. No finding or account was taken of that situation by the interlocutory decree entered in the instant case.

Again the Supreme Court of Florida in *State* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, pointed out that under Chapter 7245, Acts of 1915, the "Town of Stuart" had an area of about 640 acres, whereas, under the extended limits defined by Chapter 11750, Laws of Florida, extra session, 1925, the area was increased to about 9,460 acres or about fifteen times the original area under the Act of 1915. The court held that the Acts of 1915 extending the area were in violation of the Florida Constitution because

no municipal benefits were extended to the large area and no prospect of any. Nevertheless by the Charter Act of 1933, namely, Chapter 16692, Section 6, the boundaries of the city were redefined and the area as there redefined embraced about 2,800 acres, thus excluding a large part of the same territory which was excluded by the decision of the Supreme Court of Florida but including much which that decision held should also remain excluded. The petition of intervention by Pauline A. Selser and others in this case set forth that they had pending before this proceeding was instituted a bill for declaratory decree to determine whether their lands in the light of the decision of the Supreme Court of Florida should be regarded as in or out of the City of Stuart. The district court refused to permit such intervention and also refused to permit the suit for declaratory decree to be consolidated with this proceeding. A petition for certiorari is now pending before this court in the Selser case which should be regarded as part of this same litigation. In any event the decision of this court in the Kelley case clearly shows that it was incumbent on the district court to determine what property of the City of Stuart was subject to taxation and what revenue was reasonably to be expected therefrom, *before any decree was entered confirming the plan.* Until the court had made adequate and specific findings in that behalf the statement in the decree that the plan was "fair and equitable" was an unsupported conclusion. In the Kelley case this court held that the principles laid down in the Consolidated Rock Products Company case and in railway reorganization cases are applicable to municipal bankruptcy cases and that the same sort of findings must be had in all such cases before there is any confirmation of the plan. In the Kelley case this court among other things said:

> "Where future tax revenues are the only source to which creditors can look for payment of their claims, considered estimates of those revenues con-

> stitute the only available basis for appraising the respective interests of different classes of creditors. * * * The court must have before it data which will permit a reasonable, and hence an informed, estimate of the probable future revenues available for the satisfaction of creditors."

On the same subject, supporting the third headnote, the court further said:

> "Appropriate facts which might have been considered, but which are nowhere referred to in the opinions or findings below, are the revenues which have in the past been received from each source of taxation, the present assessed value of property subject to each tax, the tax rates currently prescribed, the probable effect on future revenues of a revision in the tax structure adopted in 1941, the extent of past tax delinquencies, and any general economic conditions of the District which may reasonably be expected to affect the percentage of future delinquencies."

The decree of the district court in the instant case wholly fails to measure up to any of these requirements. On the contrary the district court struck out every answer, petition or pleading which was interposed by these petitioners either as creditors or property owners attempting to bring about just such investigations and findings.

Under Question V, page 22, *supra,* we pointed out that Section 8 of the proposed plan confirmed by the court below undertakes to authorize adjustments of delinquent taxes and that includes alleged delinquencies on all the area ever claimed to be within the city limits including the whole of the 9,460 acres referred to by the Supreme Court of Florida in *State* v. *City of Stuart, supra.* The bill for declaratory decree filed in the Selser case shows that the properties owned by the plaintiffs in that case are outside, or at least some of them are, the present city limits as defined by the charter Act of 1933 but were within the special act, extra session of 1925. Therefore

all such taxpayers are directly affected by the proposed plan, especially as regards such alleged delinquent taxes, and yet the court below refused to permit them to intervene and refused to make any inquiry as to what lands were properly subject to taxation or what revenue could reasonably be expected to flow therefrom.

It is only fair to say that this court's decision in the Kelley case was handed down on June 1st, 1943, whereas the opinion of the Court of Appeals in this case was handed down on April 29th from the rehearing denied May 31st, 1943. If the decision in the Kelley case had already been published the decisions of the courts below would undoubtedly have been different.

QUESTION VIII.

Was It Competent for the District Court to Confirm the Plan When Illegal Favoritism Appeared on the Face of the Plan and When "Fraudulent Practices" on the Part of the Fiscal Agent Cook (Representative of R. E. Crummer & Company) Were Shown by the Petitioners' Pleadings and the Contract Attached to the Petition of Van Tassel?

(R. 167 to 177.)

The Bankruptcy Act as amended June 28th, 1940, 11 U. S. C. A., Sec. 403(e) (Pocket Supp. 88), made it the mandatory duty of the district court to guard against "fraudulent practices." The evil of such practices had been shown in the hearings before the congressional committees with respect to H. R. 8016. Those hearings developed the evil methods which had been employed by R. E. Crummer & Company and others. The court may take judicial notice of those hearings. Those hearings were on "Municipal Bankruptcy Compositions" and dealt with H. R. 8016, February 14th, 15th and 16th, 1940. At pages R. 1 and 2 will be found H. R. 8016, the passage of which was urged by the officers and attorneys who appeared before the committee on behalf of R. E. Crum-

mer & Company. They did not get what they wanted. On the contrary the testimony and data produced before the committee by F. G. Janes, Jr., of Wauchula, Florida, F. L. Revell, of Wauchula, Florida, W. Terry Gibson, of West Palm Beach, Florida, and Giles J. Patterson, of Jacksonville, Florida, caused H. R. 8016 to be amended and reintroduced as H. R. 9139. The latter bill was adopted. As a result of those hearings said sub-section (e) became part of the law and requires that the court shall carefully investigate all contracts and related matters for the purpose of ascertaining whether the

> "fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such a nature, has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof, or any of such creditors—either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue—and shall take evidence under oath to make certain whether or not any such practice obtains or might obtain."

The Act then further provides:

> "After such examination the judge shall make an adjudication of this issue, as a separate part of his interlocutory decree, and if it be found that such practice be possible, he shall forthwith dismiss the proceeding * * * If it be found that no such practice is possible, then the judge may proceed to further consideration of the confirmation of the plan."

These paragraphs of the Act are so imperative that the district court is required to make a separate and prior determination on this matter of fraudulent practices. That requirement was not complied with in the instant case.

The proposed plan and the decree itself show that Cook was being compensated or benefited both by the city and by other creditors, also that he was undertaking

to act in a dual capacity for the city and as representative of other creditors. On the face of the plan and the decree he had these benefits at stake from the city's side of the transaction:

(a) He owned at least $100,000 of old bonds or non-interest-bearing coupons (R. 22) which were to be exchanged for interest-bearing refunding bonds.

(b) He was granted the privilege of reselling his new bonds to the city and to exclusively receive in exchange therefor the proceeds of delinquent taxes and delinquent special assessments diverted from the "statutory trust" theretofore created.

(c) He had probably bought his old bonds and coupons at 10c on the dollar like many other creditors he represented (R. 132) and yet he was privileged to sell back to the city refunding bonds exchanged therefor at from 35c to 60c on the dollar (R. 21).

(d) He was given the exclusive privilege of collecting 2% or $20 for each $1,000 of old bonds exchanged by other bondholders irrespective of whether such other bondholders surrendered their old bonds for exchange voluntarily or involuntarily pursuant to the court's decree. Under this last heading he was deliberately given the right to traffic and profit on the processes of the court.

On the creditors' side of the picture he had these things at stake:

(a) He was allowed to vote the bonds of those creditors he represented, for the plan (See par. (e), R. 158, and par. (f), R. 161, of the decree).

(b) The other creditors would be required to pay him for services to be rendered to them in and about the consummation of the plan 2% on the amount of their old bonds exchanged either voluntarily or involuntarily.

As heretofore pointed out, the *ex parte* affidavit of Cook filed with the court at Tampa on September 18th

(R. 153) referred to the fiscal agency contract with Cook but for some reason the contract did not show up either with the affidavit of Cook or with the affidavit of the City Clerk (R. 151). A copy was attached to the petition of Van Tassel subsequently filed October 9th, 1942 (R. 167 to 177). That contract confirmed all the vices already disclosed by the plan and the decree as above noted and added other vices. For instance, as appears by the sentence beginning middle R. 171, the city undertook to confer upon Cook and the creditors he would represent an earmarking or first lien so to speak upon all the taxes which the city might thereafter levy for its bonded indebtedness. Under the plan the city's power to collect *ad valorem* taxes was to be completely loaded and in fact over-loaded for the refunding bonds to the exclusion of other creditors and he, Cook, as a speculator in bonds would capitalize on that alleged promise in his contract as a means of aiding him to unload at favorable prices such refunding bonds as would be issued to him and his relative R. E. Crummer and the company he represented, to-wit R. E. Crummer & Company. Again, section 7 of his contract (R. 173, 174) expressly undertook to authorize Cook, the fiscal agent of the city, to go out and speculate on the city's securities and in that way again acquire large benefits from the plan he was promoting. By virtue of the contract and the proposed plan Cook was put in the most advantageous position of any creditor and therefore other creditors with whom he was authorized to negotiate were at a great disadvantage. Again, sections 8, 9 and 10 of the Cook contract were void for the reason that they were contrary to public policy and violated the terms of the city's charter of 1933. For instance, Section 27 of Chapter 16692, Laws of Florida, 1933, the last city charter of the City of Stuart, required the appointment of a city attorney who should be the legal advisor of the city and all its officers

> "in matters relating to their official duties. He shall prepare all contracts, bonds and other instruments in

writing in which the municipality is concerned and shall endorse on each his approval of the forms and correctness thereof and no contract with the municipality shall take effect until his approval is so endorsed thereon."

The contract with Cook contained no such endorsement. On the contrary, the contract proposed to have Mr. Cook and Mr. Joseph P. Lea, Jr., have complete charge of the refunding program and whatever was necessary to be done in the bankruptcy court. The contract also undertook to delegate official authority.

It is thus seen that the scheme disclosed by the plan, the decree and the contract, plus facts alleged in the stricken answers and petitions contained all the vices condemned by this court in *American Union Mutual Life Ins. Co.* v. *Avon Park*, 311 U. S. 138, 85 L. Ed. 91, 136 A. L. R. 870, and in *Woods* v. *City National Bank and T. Co.*, 312 U. S. 262, 268-269, 85 L. Ed. 820, 825-826. The Supreme Court of Florida has also held such practices fraudulent and void in *Taylor* v. *Williams* and *W. J. Howey Company* v. *Williams*, cited in the *Avon Park case*, 311 U. S. 149, 85 L. Ed. 97. Those decisions of the Supreme Court of Florida were followed by the Tenth Circuit Court of Appeals in the case of *City of Vero Beach* v. *Rittenoure Inv. Co.*, 113 F. 2d 269. The court in that case quoted at length from *Taylor* v. *Williams* in condemning the fiscal agency contract sought to be enforced by the City of Vero Beach, Florida. Quite lately the Fifth Circuit Court of Appeals in the case of *Bradford County, Florida*, v. *Nuveen et al.*, 133 F. 2d 169, condemned such a fiscal agency arrangement as being utterly void and unenforceable and the court followed and applied *Taylor* v. *Williams* and *Howey Company* v. *Williams*. Also the decision of the Tenth Circuit in the City of Vero Beach case.

QUESTION IX.

Was the Plan Accepted and Approved by Qualified Creditors Holding Two-Thirds of the Debts Affected?

QUESTION X.

Was the Offer and Acceptance of the Plan in Good Faith?

The matters and things referred to under Question VIII above show that both of these questions should have been answered in the negative. Furthermore, the facts alleged in the pleadings of the petitioners and admitted by the attacking motions also clearly showed that Qpestions IX and X should have been answered in the negative. By striking all the pleadings of the petitioners and by denying all interrogatories propounded by petitioners the courts below refused to inquire as to what creditors Thomas M. Cook actually represented and as to what they paid for their bonds and past due coupons. The courts below also refused to make such inquiries as might have developed whether or not the bonds and coupons Cook claimed to own or control could be properly voted for the plan. The court refused to permit inquiry as to whether Gleason and Jackson were mere employees of Cook. Also whether, as alleged, Cook was the mere representative or dummy of R. E. Crummer & Company. The decision of this court in the Avon Park case shows that all of these matters were pertinent and that the confirmation of the plan is not sustained by the present record.

QUESTION XI.

Did the District Court As a Court of Bankruptcy Have Exclusive Jurisdiction and Power to Consider and Determine All Questions Relating to the Proposed Plan of Composition, Including What Property Was Subject to Ad Valorem Taxation and Whether the Proposed Refunding Bonds Would Be Valid and Unenforceable Obligations?

The decision of the Supreme Court of Florida in *State v. City of Stuart*, 97 Fla. 69, 120 So. 335, shows that the

"Town of Stuart" like thousands of other similar communities became financial wrecks on account of the wild speculative land boom which swept throughout the country in the year 1925. The area of the town was increased some fifteen times and remote rural lands, said the Supreme Court, were valued at as much as $1,000 per acre. All of the bonds here in question or nearly all were issued in that year to promote boom-time improvements. The new "City of Stuart" was insolvent from the time said bonds were issued and certainly has remained so ever since the decision of the Supreme Court in *State* v. *Stuart* decided in January, 1929, declaring that the special acts, increasing the area to fifteen times the original size, were void. The hearings and debates in congress show that Chapter 9 of the Bankruptcy Act as now amended was enacted for the purpose of enabling a bankruptcy court to salvage such municipalities and taxing entities from financial wreckage brought about largely by the boom of 1925. To that end the amendment to the Bankruptcy Act now known as Chapter 9 undertook to vest in the bankruptcy court plenary power to do all things necessary to salvage such financially wrecked taxing entities utilizing and conforming however to such basic rights and capabilities as were conferred upon such taxing entities by the local laws of the respective states. When the City of Stuart and the alleged consenting creditors brought this proposed plan into court they thereby conceded that the financial affairs of the City of Stuart had broken down completely and that only a court of bankruptcy could furnish a solution. In order to find a solution it was necessary for the bankruptcy court to analyze the liabilities and the resources of the city and in doing so to make such investigations and findings as are set forth in *Kelley* v. *Everglades Drainage District*, quoted pages 28-29, *supra*. The opinion of the Court of Appeals rendered in this case contends that the bankruptcy court had no authority to make any inquiry as to what lands or property are subject

to taxation and holds that the Act did not purport to confer any jurisdiction upon the court for any such purpose. In the companion case of *Selser et al.* v. *City of Stuart,* now before this court on certiorari, and reported 135 F. 2d 211, the Court of Appeals held that such contention about what lands were and what were not subject to taxation by the City of Stuart was a collateral attack upon the corporate existence of the city and in any case such question could be answered only in a quo warranto proceeding brought in the name of the State in a state court of competent jurisdiction. In short, the holding was that the bankruptcy court must hands off. That it can only do part of the job in the consideration and confirmation of an adequate plan of composition and refinancing.

Likewise the Court of Appeals in this case approved the ruling of the district court whereby the district court refused to strike the decree of the state court entered in a validation proceding instituted after this suit was instituted purporting to validate refundng bonds that were to be issued pursuant to the plan proposed in this case (see motion to strike the validation decree, R. 184, and order thereon, R. 18). In other words, the courts below held that the state court could properly take jurisdiction by validation suit of the very subject matter which was to be authorized by a decree of confirmation in this bankruptcy proceeding. That view is inconsistent with the terms of what is now Chapter 9 of the Bankruptcy Act and is inconsistent with other federal cases applying the same. In the *Avon Park case,* 311 U. S., text 146, this court gave sundry examples of the range and type of power which a court of bankruptcy in a proceeding such as this might exercise. Said the court:

> "that power is ample for the exigencies of varying situations. It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy."

This interpretation is consistent with many prior decisions dealing with other parts of the Bankruptcy Act which entitle a court of bankruptcy to enjoin all pending suits of whatsoever nature in other courts, state or federal, which may affect the subject-matter involved in the bankruptcy proceeding. The bankruptcy court does not divide its jurisdiction and authority with any other court whatsoever. The same view was taken by the Eighth Circuit Court of Appeals in the case of *Board of Directors of St. Francis Levee Dist.* v. *Kurn*, 98 F. 2d 394 (see 4th, 9th, 10th and 12th headnotes and supporting text). In that case the bankruptcy court enjoined the prosecution of suits by the levee district in another state brought against the railroad company then involved in a proceeding under section 77 and held that the bankruptcy court was the appropriate forum for adjudication of

> "the amount and validity of the tax liens and foreclose them."

So here the validity of the proposed refunding bonds would in a large measure depend upon whether the plan was legal when tested by the Bankruptcy Act and whether the fiscal agency contract was valid when tested by bankruptcy law and state law. Therefore it was incompetent for the state court while the bankruptcy proceeding was pending to invade the jurisdiction of the bankruptcy court in undertaking to validate the proposed refunding bonds which had not yet been authorized by a decree of the bankruptcy court.

REASONS FOR ISSUANCE OF CERTIORARI.

1. *The interlocutory and final decrees entered by the district court were contrary to sundry provisions of the charter of the City of Stuart and contrary to section 6, article IX, of the State Constitution.*

2. *The decrees of the district court relating to the plan of composition and the decree of the Court of Appeals*

affirming the same are in conflict with applicable and pertinent decisions of the Supreme Court of Florida cited in the foregoing pages of this petition. Namely, *State* v. *City of Stuart,* 97 Fla. 69. *City of Winter Haven* v. *Summerlin,* 114 Fla. 727. *State* v. *Sewell,* 126 Fla. 498. *Taylor* v. *Williams,* 142 Fla. 402. *City of Fort Myers* v. *State,* 129 Fla. 166.

3. *The decrees of the courts below are in conflict with decisions of this court rendered in cases heretofore cited in this petition.* Namely, *Crampton* v. *Zabriskie,* 101 U. S. 601. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510. *American Union, etc., Ins. Co.* v. *Avon Park,* 311 U. S. 138. *Woods* v. *City National B. & T Co.,* 312 U. S. 262. *Kelley* v. *Everglades Drainage Dist.,* 87 L. Ed. (adv.) 1091.

4. *The decisions and decrees of the courts below are in conflict with decisions of other circuits dealing with similar questions of law.* Namely, *Poinsett Lbr. & Mfg. Co.* v. *Drainage Dist.,* (8 C. C. A.) 119 F. 2d 270. *Seaboard Terminals Corporation* v. *Western Maryland Ry. Co.,* (..... C. C. A) 108 F. 2d 911. *City of Vero Beach* v. *Rittenoure Inv. Co.,* (10 C. C. A.) 113 F. 2d 269. *Board of Directors of St. Francis Levee Dist.* v. *Kurn,* (8 C. C. A.) 98 F. 2d 394.

5. *This case calls for a construction and application of important parts of Chapter 9 of the Bankruptcy Act which have not heretofore been fully and completely construed and applied by this court. Such matters are therefore matters of great public importance which are deserving of decision in this case.*

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this court for its review and determination on a day certain to be named therein a full

and complete transcript of the record and proceedings in the case docketed in that court as Number 10541 and entitled *Green et al.* v. *City of Stuart*, and that the judgment and decree of said Circuit Court of Appeals in said cause be reversed by this Court and that petitioners may have such other and further relief in the premises as to this Court may seem meet.

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No. 313

FILED
SEP 29 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

GEORGE W. GREEN, ET AL.,

Petitioners,

vs.

CITY OF STUART, FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO THE WRIT OF CERTIORARI

I.

The Petitioners, in the "Statement of Matters Involved" have so distorted the facts as shown by the Record, have so intermingled argument with facts, and have made so many gratuitous statements of facts which do not appear of record, the Respondent therefore assumes the privilege of restating the case for the benefit of the Court.

STATEMENT OF THE CASE

(The attention of the Court is called to the fact that everyone of the various petitioners before this Court were represented by one Attorney throughout the proceeding in the lower Court; to-wit, one Carroll Dunscombe).

JUNE 18, 1942. The City of Stuart, Florida, being in default of more than $600,000.00 in its bonded indebtedness of over $1,000,000., filed a petition under the provisions of Chapter IX of the Bankruptcy Act (11 U.S.C. 401-403) for approval of a Plan of Composition of its bonded indebtedness (R. 9-76). The petition (R. 9), the Plan (R. 13) and related papers (R. 24-25) specifically set forth in no uncertain terms the name, the description, the date of issue, and all other related facts, showing the various issues of bonds to be affected by the Plan of Composition. This Plan provided, in substance, (R. 13-23) that the holders of original six per cent bonds exchange them for refunding bonds maturing in thirty years, and bearing interest at greatly reduced rates, beginning at one per cent per annum. The Plan affected nothing but the bonded indebtedness of the City, and the indebtedness evidenced by a judgment rendered in 1929 for breach of contract in the sum of approximately $13,000.00. (See *Stuart v. American Surety Co.*, 38 F (2) 193). This judgment bore interest at six per cent per annum and was immediately due and payable. The holder thereof requested the City that it be allowed to receive refunding bonds at the lower rate of interest in lieu thereof, and to this of course the City naturally acceded. None of the outstanding operating expenses of the City, none of its open accounts, and no other indebtedness of the City was affected by the Plan of Composition.

The Court, on June 18, 1942, approved the petition as properly filed, prescribed the form of notice to be given to the creditors, and set a date for a hearing on the Plan for October 5, 1942, in Miami (R. 76-80). On June 23, 1942, before any notices were given to any creditors (R. 81-82), the Court, by a nunc pro tunc order, changed that part of its order of June 18, 1942, so that the hearing was set for September 14, 1942, instead of October 5, 1942. The notices going to

creditors, pursuant to the order of the Court, all gave the date of September 14, 1942, as the date of the hearing (R. 213, 204, 83).

After the filing of the Plan, and on June 25, 1942, the City, in accordance with the provisions of the Act (11 U.S.C. 403(c)) gave notice of application for Interlocutory or Temporary Injunction to enjoin various creditors from bringing actions against the City pending the determination of the matter, and the date of July 18, 1942, was set for a hearing on this injunction. Among the suits listed (R. 206-208) was that of Pauline A. Selser, et al. vs. City of Stuart. On July 2, 1942, (R. 200) after receiving notice, Pauline A. Selser filed an answer to the application for injunction as to her claim, alleging that her cause of action should not be stayed. At the same time (R. 201-203), she petitioned the court to stay the action then pending in the State Court to validate the bonds to be issued under the refunding program and to stay the bankruptcy proceedings until her action in the Federal Court to determine whether certain lands should be excluded from the city limits under the Declaratory Judgment Act could be determined (R. 202-203). The matter came on for hearing on the application for the injunction on July 18, 1942, and the Court restrained all other actions pending the determination of the matter except that of Pauline A. Selser, she being allowed to continue her action in the Federal Court under the Declaratory Judgment Act. To the application of Pauline A. Selser to stay the bond validation proceeding in the State Court, and to stay the bankruptcy proceeding, the Court on July 20, 1942, (R. 139) entered an order of denial thereof.

JULY 7, 1942. One George W. Green filed a proof of claim (R. 83-86) on three alleged promissory notes, each in the sum of $5,000.00, with interest thereon at eight per cent per annum, and with a balance due thereon of $29,168.06.

Copies of the notes were not attached to the proof of claim. These alleged notes, even if valid claims against the City, were in no manner affected by the Plan.

JULY 13, 1942. George W. Green filed an answer to the Plan of Composition, objecting to it (R. 92-108). Along with the answer, Green filed interrogatories to the Mayor of the City (R. 86-91).

JULY 18, 1942. Pauline A. Selser again filed a motion to stay the suit in the State Court to validate the refunding bonds which would be issued under the Plan of Composition on various grounds (R. 108-110), the substance of which was that the Court should determine first in the suit which she then had in the Federal Court the taxability of certain lands in the City before the bonds should be validated. She did not show herself in the motion to either be a bondholder or a taxpayer (R. 108-110).

JULY 18, 1942. Newport Culvert Company, on behalf of St. Lucie Estates Trust, filed a claim in the sum of $17,212.46, with interest thereon at eight per cent since December 8, 1938 (R. 110-113). The claim was not based on any securities affected by the Plan of Composition, but apparently was based upon some claim for a deficiency decree in a mortgage foreclosure, which had nothing whatsoever to do with the Plan of Composition, and was not in any manner affected by it.

JULY 25, 1942. Interrogatories were filed by Newport Culvert Company to Thomas M. Cook & Company (R. 139-142).

AUGUST 18, 1942. Newport Culvert Company filed an answer objecting to the Plan of Composition (R. 127-138).

AUGUST 19, 1942. One Robert E. Turner, a citizen and

resident of Atlanta, Georgia, claiming to be the owner of certain property in the Town, asked leave to intervene in the case (R. 134-137), and moved the Court to stay the case until the case of Pauline A. Selser could be determined, and also that the case be stayed until the taxability of certain lands in the City should be determined.

SEPTEMBER 3, 1942. The City on September 3, 1942, (R. 144-148) served a motion on George W. Green, Newport Culvert Company, on behalf of St. Lucie Estates, and Robert E. Turner to strike the claims of George W. Green and Newport Culvert Company, on behalf of St. Lucie Estates, and the answers predicated thereon because (a) the claims were not in any manner being adjudicated in the bankruptcy proceeding; (b) the claims were not based on any bonds or coupons involved in the bankruptcy proceeding and were entirely foreign thereto; and (c) the Plan of Composition made no provision for the payment or disposition of the purported claims of the aforesaid creditors; that the answers were predicated upon claims which were not involved in the proceeding, and therefore such creditors were entirely foreigners to the proceeding.

The motion to strike the answer of Robert E. Turner (R. 148) was based on the contention that (a) Robert E. Turner did not own any bonds or coupons involved in the proceeding and therefore was an entire foreigner thereto; (b) that there is no authority in law for a taxpayer to intervene or be heard in the bankruptcy proceeding; (c) that if Robert E. Turner is a taxpayer he is represented in the proceedings by the City of Stuart, and therefore the matters raised by him were entirely collateral to the proceedings; (d) that the Municipal Bankruptcy Act makes no provision for determining whether or not lands or properties are liable for taxation for

the securities to be issued under the Plan, but its sole authority is to confirm or reject the Plan.

SEPTEMBER 14, 1942. The matter came on for hearing on Sept. 14, 1942 (the date set for a hearing on the Plan) before the Honorable William J. Barker, Judge of the United States District Court, in Miami, and the Court made the following order (R. 155-156):

> "This proceeding came on to be heard in Miami, Florida, on the 14th day of September, A. D. 1942, at 9:30 o'clock A.M., in accordance with notice to creditors heretofore given in said cause. After full consideration, the Court finds and determines that it has jurisdiction of the subject matter of this proceeding and of the petitioner and of all creditors of the petitioner, and that all creditors of the petitioner were duly, regularly and lawfully notified of the time, place and purpose of the hearing in the manner directed in the order entered herein on June 18, 1942.
>
> "1. At the time and place aforesaid it appeared that a proof of claim and answer were filed in this proceeding by one Newport Culvert Company, to which the petitioner has moved to strike; that one George W. Green has filed a proof of claim in this cause, and an answer based thereon, to which the petitioner has filed a motion to strike, *and it appearing to the Court that the proofs of claim of the aforesaid George W. Green and the Newport Culvert Company, and the answers based on such proofs of claim aforesaid, are not materially affected by this Plan of Composition, and that such claims are not in any manner affected, and therefore the answers based thereon are irrelevant and immaterial to this proceeding and are hereby stricken from this cause.*"

As to the intervention of Robert E. Turner, a taxpayer, the Court made the following ruling (R. 156):

"2. It further appears that one Robert E. Turner, who showed himself to be a taxpayer in the City of Stuart, has asked permission to intervene in the cause and has filed an answer herein, contending that his property is not properly taxable for the refunding bonds to be issued hereunder, and it appearing to the Court that the aforesaid Robert E. Turner has no authority in law to intervene in this cause, and therefore the motion of Robert E. Turner for leave to intervene is denied."

At this hearing (had on the date previously set by the Court), no creditor having appeared but these various objectors, the Court allowed the City to make its prima facie by affidavits. These affidavits were produced and the Court actually manually signed the decree in Tampa three days later, although the matter was adjudicated in Miami September 14, 1942.

OCTOBER 9, 1942. Long after the entry of the interlocutory decree, Pauline A. Selser, Mary M. Gosling, and George Van Slyck (this being the third application of Pauline A. Selser before the Court), petitioned the Court to allow them to intervene in this case (R. 216-217) and to stay the bankruptcy proceedings pending the determination of a certain appeal then pending in the Circuit Court of Appeals for the Fifth Circuit (apparently case No. 10464) *Selser et al. vs. City of Stuart*, 135 F. (2), 211. Pauline Selser had lost her suit in the lower Court and was now contending that the bankruptcy proceedings should be stayed until her action in this case could be reviewed by the Circuit Court of Appeals.

Likewise, on this same date one A. T. Van Tassel moved the Court to allow him to intervene in the proceedings.

OCTOBER 15, 1942. George W. Green and Newport Culvert Company moved the Court to set aside the order of September 18, 1942, striking their answers and claims.

Robert E. Turner also asked that he be allowed to intervene (R. 178-183). (This in spite of the fact that the Court had previously denied the intervention of Turner (R. 156).

On the same date George W. Green again moved the Court to strike the validation decree entered in the State Court (R. 184), and Green and Newport Culvert Company moved that the various interrogatories (R. 184-185) be answered by the parties on whom they had been served.

OCTOBER 16, 1942. The various motions of Green, Turner, Van Tassel, Newport Culvert Company, Pauline A. Selser, Mary M. Gosling and George Van Slyck were considered by Judge John W. Holland, who entered an order denying all of the various motions of the parties (R. 186-188). The Court again specifically determined:

> " * * it appearing to the Court that such persons are not in any manner affected by this Plan of Composition, and that such persons do not own securities affected by this Plan of Composition and therefore are strangers to this proceeding and have no right to be heard herein, and that some of such persons are taxpayers and therefore have no right to intervene in this cause; and it further appearing to the Court that due and regular notice was given in accordance with the Bankruptcy Act for a hearing on the petition on September 14, 1942, and that all of such persons had ample opportunity to be heard, and that an interlocutory decree has been duly and regularly entered in this cause, and that more than ten days from the entry thereof has expired, * * "

On this same date a final decree was entered (R. 188-191) finally confirming the Plan of Composition. This final decree specifically referred to the various issues of bonds being affected by the proceedings, and made no reference whatsoever to the various claims of the taxpayers and creditors not affected by it.

It designates the various issues of original bonds being affected, cancels them in effect, and holds the City obligated upon the bonds to be issued in lieu thereof (R. 189-190). To this date every known bondholder has exchanged his securities for the refunding bonds.

OCTOBER 19, 1942. George W. Green, Robert E. Turner and Newport Culvert Company filed notice of appeal from the order of September 18, 1942, striking their answers and claims, and also from the order of October 16, 1942, refusing to set aside the order and to reinstate their claims and answers, and also appealed from the final decree of October 16, 1942; Van Tassel, Pauline A. Selser, Mary M. Gosling and George Van Slyck "appealed from the order of October 16, 1942, refusing to permit them to be heard, and the final decree *eneterd* on October 10th, 1942." The decree was actually entered on October 16, 1942.

The Circuit Court of Appeals in the case of *Green vs. Stuart,* 135 F. (2), 33, affirmed the various orders of the lower Court.

II.

ARGUMENT

Point One

The Petitioners, Green and Newport Culvert Company, are not affected by the Plan of Composition, and therefore are strangers to this proceeding.

The Plan of Composition was filed strictly in accordance with 11 U.S.C. 403 (a), which provides that:

> "The 'Plan of Composition', within the meaning of this Chapter, may include provisions modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through issuance of new securities of any character, or otherwise, and may contain such other provisions and agreements not inconsistent with this chapter as the parties may desire."

It is clearly apparent from the Plan (R. 14) that it affected only the bonded indebtedness of the City specifically described therein, and one judgment owned by the American Surety Company recovered against the City years ago. See *Stuart vs. American Surety Company*, 38 F. (2) 193. As a matter of fact the holders of this judgment had specifically requested that they take the bonds, which would greatly reduce the annual interest on the judgment and would spread its payment over a period of thirty years. Under the Plan, the holders of the old bonds and the holders of this judgment were to exchange them for new refunding bonds maturing in thirty years and bearing interest at a low rate of interest, beginning with a rate of one per cent per annum. At the time of the Plan, the City was in default on this indebtedness of over half million dollars. No other indebtedness of the City, including past due open accounts, operating expenses, or any other accounts and expenses were affected thereby. Creditors holding such other accounts now stand in the same position that they stood in before any Plan was filed; and Green and Newport Culvert Company, quite obviously, have every right at this moment that they had prior to the time that the bondholders exchanged their old past-due indebtedness for new refunding bonds.

If there was any possible doubt as to whether or not Green and Newport Culvert Company were affected by the Plan, that matter was firmly put to rest by an order of the Court in the

Interlocutory Decree when it struck from the files their claims and adjudicated (R. 156):

> "I. At the time and place aforesaid it appeared that a proof of claim and answer were filed in this proceeding by one Newport Culvert Company, to which the petitioner has moved to strike; that one George W. Green has filed a proof of claim in this cause, and an answer based thereon, to which the petitioner has filed a motion to strike, and it appearing to the Court that the proofs of claim of the aforesaid George W. Green and the Newport Culvert Company, and the answers based on such proofs of claim aforesaid, are not materially affected by this Plan of Composition, and that such claims are not in any manner affected, and therefore the answers based thereon are irrelevant and immaterial to this proceeding and are hereby stricken from this cause."

Not being satisfied with this order, the Appellants, Green and Newport Culvert Company (R. 178) moved to vacate it and to reinstate their claims. This motion came before another District Judge, who also denied the motions and again ruled that the Appellants, Green and Newport Culvert Company, were not affected by the Plan (R. 186):

> "* * it appearing to the Court that such persons are not in any manner affected by this Plan of Composition, and that such persons do not own securities affected by this Plan of Composition and therefore are strangers to this proceeding and have no right to be heard herein, and that some of such persons are taxpayers and therefore have no right to intervene in this cause; and it further appearing to the Court that due and regular notice was given in accordance with the Bankruptcy Act for a hearing on the petition on September 14, 1942, and that all of such persons had ample opportunity to be heard, and that an interlocutory decree has been duly and regularly entered in this cause, and that more than ten days from the entry thereof has expired, * *."

Both of these orders specifically followed the provisions of the Bankruptcy Act (11 U.S.C. 403 (a)), which provide that:

> "No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested."

The alleged claim of George W. Green was not based upon any bonds or coupons affected by the Plan of Composition but was based upon three alleged Promissory Notes dated May 19, 1926 (R. 83-85), all of which the City has consistently, and does now consistently, deny liability thereon. A complete history of Mr. Green's various law suits against the City in attempting to secure a judgment on these notes will be found in the cases of *Green vs. Stuart*, 81 F. (2) 968, Cert. Den. 82 L. Ed. 575; *Stuart vs. Green*, 91 F. (2) 603, Cert. Den. 83 L. Ed. 1510; *Stuart vs. Green*, 94 F. (2) 942; *Green vs. Stuart*, 101 F. (2) 309. In the first case, *Green vs. Stuart*, 81 F. (2) 968, the lower court directed a verdict in favor of the City on the notes and on appeal the Circuit Court of Appeals reversed the case and remanded it for further proceeding. Thereupon jurisdiction of the Court was assailed and the lower court then dismissed the action for lack of jurisdiction. This action was affirmed by the Circuit Court of Appeals. *Stuart vs. Green*, 91 F. (2) 603. The other cases involve matters not going to the merits of the cause. The City has consistently denied liability on the notes and Green has never brought another action in an attempt to adjudicate his alleged claim. Thus it is that his claim is on some disputed matter, not bonds or coupons, affected by the Plan which would entail several years of litigation before a final result would be obtained.

The claim of the Newport Culvert Company, on behalf of St. Lucie Estates (R. 110-113) was not based on any bonded indebtedness affected by the Plan, but is based upon some claim that the City purchased certain property subject to a deed of trust and thereby assumed to pay certain Notes which were secured by a mortgage on the property. Again we have some sort of nebulous law suit which the Claimant is attempting to convert into bonded indebtedness. Without burdening the Court with any citations of authorities in Florida, such claim itself, even if affected by the Plan, is not a valid claim against the City. Be that as it may, the City has and does consistently deny liability on the claim, but does not contend that it was affected by this Plan of Composition, and if the Newport Culvert Company has any claim against the City it has a right to reduce the same to judgment by action in the proper court.

Apparently the Petitioners, Green and Newport Culvert Company, believe that under the decision of the case of *Poinsett Lumber Company vs. Drainage District No. 7* (C.C.A. 8) 119 F. (2) 270 (1941) *all of the indebtedness* of the City regardless of whether liquidated or unliquidated, or whether set forth in the Plan, became affected by the Plan and therefore that provision should have been made in the Plan for Green and Newport Culvert Company to litigate in the bankruptcy proceedings their alleged claims against the City. Quite obviously the effect of this contention would have meant that bondholders of the City who were willing to swap original 6% bonds for 1% refunding bonds, would have been held in abeyance for several years until lengthy litigation could have been concluded to determine whether or not Green and Newport Culvert Company had some kind of claim against the City. Then all bondholders would have been faced with the proposition of whether or not under the laws of the State of Florida refunding bonds could have even been issued in

exchange for this type of indebtedness. In any event, the bankruptcy proceeding has strengthened the security of any claim that these creditors may have against the City.

The Poinsett case, supra, decided only that the bankruptcy court did not abuse its discretion in refusing to allow a creditor to bring action in a State Court on an unliquidated claim for damages because of being flooded by overflow water in the construction of the District. In order to be sure about this point we secured the original record in that case, and submitted it to the Circuit Court of Appeals when this case was argued, and it definitely appears (aside from our contention that the case turned on whether or not the Court abused its discretion in refusing to allow plaintiff therein to bring action against the District), that *all of the indebtedness of the District, whether liquidated or unliquidated, and particularly any claims against the District because of overflow were incorporated in the Plan.* The original record in that case, on page 107 therein, specifically provided that:

> "The district proposes to readjust and refinance *all its present outstanding indebtedness, including such as may be established in any bankruptcy or debt composition proceedings hereunder (excepting the debts not affected by the plan, as described in the last preceding paragraph hereof)*, by paying the creditors or holders of such debts the (fol. 181) sum of 25.879 cents *falt* for each dollar of the principal amount of their respective claims, exclusive of interest; that all such payments will be made from the proceeds of a loan authorized by Reconstruction Finance Corportion, an agency of the United States Government, which proceeds have been or will be disbursed to or for the benefit of said drainage district for said purpose." (Emphasis supplied.)

It thus appears that the Plan made specific provision for the composition of the unliquidated claim attempted to be asserted

by the Poinsett Lumber Co. The history of that case may be found in the case of *In Re Drainage District No. 7*, (D. C. Ark.) 25 Fed. Supp. 370, and *Luhrman vs. Drainage District No. 7*, 104 F. (2) 696, Cert. Den. 308 U. S. 604, 60 Sup. Ct. 141, 84 L. Ed. 530. It is interesting also to note that the Court in the Poinsett case, 119 F. (2) 270, at page 274, pointed out that the Lumber Company was a creditor "with a claim subject to adjustment in the bankruptcy proceeding."

The Court in the instant case, on two occasions, has ruled that the Petitioners, Green and Newport Culvert Company, are not affected by the Plan, and it is indeed hard to understand why they are now before this Court attempting to become involved in some matter which is entirely foreign to them. They have every right they ever had before the case was filed, and they have not been affected in any manner whatsoever, therefore they cannot now complain of action in the lower court in the bankruptcy proceedings.

Philadelphia W. & B. R. Co. vs. Howard, 13 How. 307, 14 L. Ed. 157,

Case vs. Kelley, 133 U. S. 21, 10 S. Ct. Rep. 216, 33 L. Ed. 513,

Livingston vs. Moore, 7 Pet. 469, 8 L. Ed. 751,

Campbell vs. Pratt, 2 Pet. 354, 7 L. Ed. 385,

United States vs. Burdett, 9 Pet. 682, 9 L. Ed. 273,

Johnson vs. Jones, 1 Black 209, 17 L. Ed. 117,

Kennedy vs. Cresswell, 101 U. S. 641, 25 L. Ed. ——,

Thompson vs. Roberts, 24 How. 233, 16 L. Ed. 648,

Close vs. Glennwood Cemetery, 107 U. S. 466, 2 S. Ct. Rep. 267, 27 L. Ed. 408.

If Green and Newport Culvert Company have valid claims against the City, they still have recourse in the proper court to have such claims adjudicated, and quite obviously by virtue of all the bonded indebtedness of the City being placed on a firm basis, the City will be in a much better position to pay these alleged creditors whatever is owing to them, if anything. The City, at the time of filing of the Plan, had many open accounts outstanding in the same position as these, but none of these other persons have made any objection to this proceeding. Also, it is quite obvious that if Green's claim should have been incorporated in the Plan, this matter would have been delayed for several years pending strenuous litigation throughout the various courts until that matter could be determined, because the City contends that it owes Green nothing. If anything, the refunding has been a benefit to Green if he has a valid claim against the City.

Point Two

There was no error on the part of the lower court in (a) Striking the claim of Robert E. Turner, a taxpayer; and (b) Denying the petitions of Van Tassel, Selser, Gosling and Van Slyck to intervene in the proceedings.

Robert E. Turner, a taxpayer, prior to the time of the hearing on the Plan, filed a petition to intervene and filed an answer, in which he contended that his property was not properly taxable for the refunding bonds to be issued under the Plan. The Court (R. 156) struck his answer. After that Pauline A. Selser, Mary Gosling and George Van Slyck again attempted to intervene in the case, and to stay the proceedings pending the determination of an appeal before the Circuit Court of Appeals for the Fifth Circuit in the case of *Selser*, et al. vs. Stuart, apparently case No. 10464, *(Selser vs. Stuart*, 135 F. (2) 211), in which a declaratory judgment was sought as to the taxability of their lands for the bonds. The Court

again denied the rights of these persons to intervene in the case (R. 186), pointing out they were in no manner affected by the Plan, and therefore they have no right to intervene in the case.

These alleged taxpayers now have every right they ever had before any bondholders, holding the bonded indebtedness of the City, exchanged them for new bonds under the Plan. As a matter of fact, the bankruptcy court cannot go into these collateral matters of the taxability of the lands of various taxpayers, as the Circuit Court of Appeals for the Fifth Circuit pointed out in the cases of *Leco Properties, Inc. vs. R. E. Crummer & Company,* (C.C.A. 5) 128 F. (2) 110, and in *Ware vs. R. E. Crummer & Company,* (C.C.A. 5) 128 F. (2) 114. See also *In Re Willacy County Water Control & Improvement District,* 36 Fed. Supp. 36, at page 39. Judge Hutcheson, in the Leco Properties case, particularly pointed out that the jurisdiction of the bankruptcy court "is strictly limited to approving or disapproving, and carrying out the Plan of Composition." That was all that was done in the instant case. The Court merely determined that it was fair for all of the holders of the bonded indebtedness of the City to exchange them for new refunding bonds, and it is interesting to note that as of this date every known bond has been exchanged, without a single objection on the part of any bondholder affected by the Plan.

The disposition, in the Willacy County Water Control & Improvement District case, supra, made by the District Judge on petition to intervene by various taxpayers is squarely on point with the contention of the City here. In that case the taxpayers attempted to intervene and have the bankruptcy court determine the taxability of their lands for the bonds being issued pursuant thereto. The Court in that case said:

> "The power of the court to inquire into indebtedness, which is given by the Bankruptcy Act, 11 U. S. C. A. Sec. 1 et seq., is not such a power as would support a suit against the petitioner by those who seek to intervene. The statute limits the order of the court, under the right to compose indebtedness, to the confirming of the composition, or to the rejecting of the composition and the dismissal of the proceeding. This is mandatory and the court has no further jurisdiction."

The District Court in that case made the very pertinent observation that nothing that would be done in the composition proceeding would injure the right of the taxpayers, because it neither validates nor unsettles the right of taxability of lands of the City:

> "The equity of the case is satisfied by the thought that nothing that is done in these proceedings can injure the rights of Coats, et al. If they have the right to attack in a proper suit, and in a proper way, the bonds that are held by the creditors in this proceeding, they may do so in a bill wherein those holders are made parties. What is done in this proceeding, neither validates nor unsettles that bonded indebtedness insofar as it would prejudice the rights of Coats, et al. If they have no case, then the indebtedness against their properties is reduced by these proceedings."

III.

PETITIONERS' BRIEF

Even if the petition for Writ of Certiorari and the brief in support thereof of the Petitioners conformed to the rules of this Court (which it does not), we do not deem it necessary to answer in detail the many collateral matters, and argumentative statements having no bearing on the issues in this case, raised by it. As a matter of fact, the Petitioners even demanded

that the Record be deleted in the Circuit Court of Appeals (R. 1-8) and that demand was acceded to by the Circuit Court of Appeals, so that the complete Record is not before the Court.

If the taxpaying Petitioners were dissatisfied with the discretionary action taken by the City Council in refunding its bonded indebtedness, they have a remedy the next time the City election is held. Quite obviously, however, the bankruptcy court has no jurisdiction to determine whether or not every little parcel of land in a City is liable for taxation of the bonded indebtedness of the City. Even in the State validation proceeding to validate the new refunding bonds which would be exchangeable for the original indebtedness, such question cannot be raised by a taxpayer. *State vs. Venice*, 147 Fla. 72 So. (2) 365. Their remedy, if any, is by quo warranto or injunction in the State court.

The Petitioners indeed are in an unusual position before this court. They have harrassed this City with various forms and types of litigation in the bankruptcy court, in other cases, such as *Selser vs. Stuart*, 135 F (2) 211, have harrassed the City in the State validation proceeding, all of which actions were decided adversely to their interest. The net result of the matters to which they objected has been that if their lands are taxable for any bonded indebtedness their position has been improved; if their lands are not legally taxable, (which question can be determined by proper proceeding in the State Court), they stand, of course, in no different position than they did before the bankruptcy proceedings were instituted.

We find no basis in the Record for any of the gratuitous, inflammatory, highly untrue, and prejudicial matters appear-

ing in Appellant's brief and therefore will not attempt to answer the same since the portion of the Record brought before this Court speaks for itself.

CONCLUSION

I.

In conclusion, it is respectfully submitted that the Writ of Certorari should be denied in this cause because:

(a) The Appellants, George W. Green and Newport Culvert Company, were in no manner affected by the Composition Proceedings and now have every legal right that they had prior to the time that the Bankruptcy Proceeding was filed.

(b) The Petitioners, Pauline A. Selser et al. as taxpayers, were represented by the City in the Composition Proceedings and therefore were not entitled to intervene in the proceedings and attempt to upset matters which their elected body had determined as for the best interest of the City.

II.

The position of all of the Petitioners has not been changed in any manner by these proceedings. The Petitioners who claim to be creditors are now better off because of the reestablishment of the credit of the City and the Petitioners who are taxpayers are now better off (if they are taxpayers—which matter can be determined in the State Courts of the State of Florida) because the tax load has been reduced by virtue of the Composition Proceeding.

III.

All procedure was taken precisely in the form and manner as required by the Bankruptcy Act and every creditor affected by the Plan had received its refunding bonds.

IV.

No reason has been shown this Court why a writ of certiorari should be granted; there is no conflict of decision between Circuit Courts of Appeal; no decision of important local law has been decided in conflict with applicable local decisions; no question of important Federal law has not been but should be settled by a decision of this Court in this case.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 313.

GEORGE W. GREEN ET AL., PETITIONERS,
VS.
CITY OF STUART, FLORIDA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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STATEMENT OF MATTERS AND QUESTIONS INVOLVED.

The brief for respondents opens with an assertion that the "Statement of Matters Involved" contained in the petition has distorted the facts as shown by the record and has intermingled argument with facts and has made so many gratuitous statements of fact which do not appear of record that counsel for respondents assumes the privilege of restating the case for the benefit of court. Their

statement of the case consists entirely of a statement of the chronology of the filing of various papers and documents constituting the record, together with certain extracts from the orders of the district court. We find no objection to their chronological statement saving in one particular. At page 7 of their brief counsel assert that a hearing had been previously set at Miami for September 14th, 1942, at which hearing

> "no creditor having appeared but these various objectors (meaning petitioners represented by Carroll Dunscombe) the court allowed the City to make out its *prima facie* (case) by affidavits. These affidavits were produced and the court actually manually signed the decree in Tampa three days later although the matter was adjudicated in Miami September 14th, 1942."

The record does not bear out these assertions. On the contrary the affidavits referred to are the affidavits of L. B. Eurit, City Clerk of the City of Stuart (R. 150 to 152) and the affidavit of Thomas M. Cook. It appears by the record (R. 152 and R. 155) that both of these affidavits were dated September 16th, 1942, and sworn to before a notary public on the same date. That date was *two days after* the supposed hearing in Miami and therefore the two affidavits were not in existence at that time. Furthermore R. 150 and R. 152 shows that the two affidavits were *filed* September 18th, 1942. That was four days after the supposed hearing at Miami and was the actual date of the interlocutory order in question as it appears R. 163. Therefore the record is plain that these affidavits were neither in existence nor considered at Miami but were filed before the court in Tampa. Thus it appears that the actual hearing and consideration of the affidavits as evidence to make out the City's supposed *prima facie* case was *ex parte* and at a different city and place from that stated in the advertisement as published R. 203 to 206. The record however shows that upon motion of petitioners (R. 178) to vacate the interlocutory order, Judge Holland

at Miami on October 16th, 1942 (R. 186), made an order denying that motion and reaffirmed Judge Barker's prior order to the effect that petitioners neither as creditors nor as property owners had any such status as entitled them to be heard on their answers or petitions of intervention. The two orders, the one by Judge Barker and the other by Judge Holland, showed that if counsel for petitioners had been on hand at Miami, Florida, on September 14th, or at Tampa on September 18th the result would not have been different and that brings us squarely face to face with the several questions embodied in the petition heretofore filed beginning page 16 thereof.

We regard it as most significant that while counsel for the respondents claim that our

> "Statement of Matters Involved has distorted the facts"

and so forth, they have not undertaken to point out any instance wherein there has been any such distortion or any error of fact in our entire Statement of Matters Involved. They have taken great pains to point out the chronology of events, and went wrong in one essential particular as already explained, but they wholly failed to even criticize our analysis of the petition for confirmation of the plan of composition or our analysis of the plan made part thereof or our analysis of the pleadings by the several petitioners or our analysis of the fiscal agency contract entered into between the City and Thomas M. Cook. Having remained silent with respect to all those matters the brief for respondent in effect concedes that the plan and the fiscal agency contract were subject to all the illegalities and criticisms leveled against the same. Moreover they do not undertake to defend the various illegalities of the proposed plan of composition or the illegalities of the fiscal agency contract. The gist of their argument is to the effect that conceding all the illegalities pointed out the petitioning creditors and property owners had no

right to be heard. That they were not affected by the proposed plan, illegal though it may have been in many respects. Moreover they contend that their condition was made better if anything and for that reason also they have no standing to make complaint. Such line of argument is fallacious because it assumes as true that which was to have been but was not demonstrated. The several questions I to XI inclusive, pages 16 to 37 of the petition filed here, presented definite reasons why under the facts and the law both the petitioning creditors and the petitioning landowners were injured by the plan as confirmed and why the courts below were in error in undertaking to confirm the same. We shall take the liberty of restating those questions, and point out briefly how counsel for respondents have utterly failed to answer the same.

ARGUMENT.

QUESTION I.

Were petitioners George W. Green and Newport Culvert Company such creditors of the City of Stuart as were severally affected by the "plan" of composition proposed by the City and were they severally entitled to contest the material allegations of the City's petition for confirmation of such "plan"?

At page 12 of respondent's brief counsel attack the claim of Green by pointing out that it has been the subject of contest in several decisions that went before the Court of Appeals and that the Bankruptcy Court should not be burdened with considering such defenses as the City may have. If the court wishes to glance at the four cited decisions in the Green case it will be found that 81 F. 2d 968 was an out and out decision in favor of Green based upon a solemn resolution of the City of Stuart which was in all respects affirmed and ratified by Chapter 14407, Laws of Florida, 1929. After remand the district court entered a judgment for Green on the promissory notes in question notwithstanding a jurisdictional objection raised by the City. On the second appeal, 91 F. 2d 603, the judgment of the district court in favor of Green was reversed on the jurisdictional point only. The holding was that because the notes of the City had been made payable to a named payee the endorsement in blank did not make them bearer obligations so as to entitle the transferee or assignee to sue in the federal court. Therefore the judgment on the merits was vacated for want of jurisdiction. 94 F. 2d 942 was simply a matter of taxing costs on the prior appeal. 101 F. 2d 309 involved only the question of whether after the reversal in 91 Fed. 603 the district court acted properly in vacating the judgment in favor of Green

which had been reversed. The holding was that since the judgment was wholly without jurisdiction same should be vacated. Thus after all four cases are considered the debt owned by Green still remains valid for reasons declared in *Green* v. *Stuart*, 81 F. 2d 968, though the declaration and finding of the court there made was without jurisdiction. Counsel for petitioners do not pretend to claim that Chapter 14407, Acts of 1929, has been repealed or that anything has happened to make the debt owned by Green unenforceable. That statute authorized the issuance of $210,000 of negotiable bonds of the City of Stuart to be issued for Green's claim and others making up that total amount and further that the City should pledge its full faith and credit for the payment of such funding bonds and that there should

> "be levied annually a special tax upon all the taxable property of said City over and above all taxes authorized or limited by the charter of said City sufficient to pay the interest and principal of said bonds as the same become due and payable."

Even if the Green claim had not been so liquidated the Bankruptcy Court had ample and exclusive power to approve the claim even if it had been owned by a resident of the City of Stuart. The term "security" as defined by 11 U. S. C. A., Sec. 402, includes bonds, notes, judgments, claims and demands "liquidated or unliquidated."

Attack is also made upon the claim of Newport Culvert Company with the suggestion that the City may have some valid defense but the unfortunate position of respondents in attacking the Green claim as well as the Newport Culvert claim is that they filed motions to strike those claims and the answers predicated thereon and those motions admitted as true the facts set out in those answers and claims.

Respondents next present what they call an analysis of *Poinsett Lbr. & Mfg. Co.* v. *Drainage Dist.*, 119 F. 2d 270, as not entitling either Green or Newport Culvert

Company to file their claims or answers or be heard with respect to the plan proposed by the City and the majority of its bond creditors. The claim made by opposing counsel bottom page 14 of our brief is not borne out by the decision nor indeed by the quotation found on that page said to be from the transcript of record. The matter arose upon a petition filed by the Lumber Company for leave to institute a damage suit against the drainage district in a state court notwithstanding the petition for composition which had been filed in the federal court. The Lumber Company contended that its claim for unliquidated damages dues to flooding was not "affected by the plan" and that the drainage district and its bondholders had not even named the Lumber Company as a creditor or one to be taken into account. Therefore the Lumber Company, according to the opinion of the court, was not mentioned in the petition for composition nor did the petition as quoted page 14 of respondent's brief say anything about that unliquidated claim or any other. The court however refused to grant a petition for leave to sue in the state court on the ground that though unliquidated the claim of the Lumber Company was a "security" within the meaning of 11 U. S. C. A., Sec. 402. That the Bankruptcy Court had exclusive jurisdiction to adjudicate that claim upon the petition for composition which had been filed. In short the conclusion was that the claim though not a bond claim or a promissory note claim was affected by the plan and upon being allowed would be *payable from the same source* as the obligations of the district represented by bonds or other "securities."

Still more directly in point is the case of *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654, 9 C. C. A., certiorari denied 311 U. S. 718, rehearing denied 312 U. S. 714. The 14th headnote of that case reads as follows:

> "The fundamental classification under bankruptcy law must be in accordance with the source or fund out of which the payment is intended to be

made. Bankr. Act, Sec. 83, sub. b, 11 U. S. C. A., Sec. 403, sub. b."

This was announced as being the law notwithstanding the California Statute under which a preference was claimed for certain bonds and coupons that had matured and had been presented for payment. The Ninth Circuit also held that the Bankruptcy Act was superior to all state laws on the subject. Therefore 11 U. S. C. A., Sec. 403(b), was controlling. In the case of *Taylor* v. *Provident Irr. District*, 123 F. 2d 965 (9 C. C. A.), certiorari denied 62 S. Ct. 914, the court reaffirmed the same doctrine as shown by the second headnote and supporting text. There cannot and is not any denial of the fact that the Green debt and the debt due to Newport Culvert Company were and are payable from the *same source* as the bonds claimed by those who joined in the petition for a plan of composition. Therefore by the express language of the statute they were of the same class as the bond creditors and were necessarily affected by the proposed plan irrespective of whether their debts were liquidated or unliquidated. It was not within the power of the City or its consenting creditors to ignore either the Green debt or the Newport Culvert Company debt because 11 U. S. C. A., Sec. 403(a), requires

> "There shall be filed with the petition a list of all known creditors of the petitioner, together with their addresses so far as known to petitioner, and description of their respective securities showing separately those who have accepted the plan of composition, together with their separate addresses, the contents of which list shall not constitute admissions by the petitioner in a proceeding under this chapter or otherwise."

The purpose of this requirement was that all might have due notice and an opportunity to be heard. A further provision of the same subsection of the statute is that

> "In case any controversy shall arise as to whether any creditor or class of creditors shall or shall not

> be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested."

That section of the statute was not complied with because, as we have seen, there was no notice to counsel for Green or Newport Culvert Company that the motions to strike their claims and answers would be called up for hearing either at Miami or at Tampa. Subsection (b) of the same section provides that not less than ten days prior to the date for hearing

> "any creditor of the petitioner affected by the plan may file an answer to the petition controverting any of the material allegations therein and setting up any objection he may have to the plan of composition."

That is what these creditor-petitioners did, but their claims and answers were summarily stricken out on the assumption that they belonged in a different classification because they did not hold bonds or judgments based on bonds of the City. Such conclusion of the district court, affirmed by the Court of Appeals, was, we believe, a fundamental error that will vitally affect the proper administration of the Bankruptcy Law as applied to municipal bankruptcy compositions.

QUESTION II.

Were George W. Green, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser et al., as taxpayers, some within the original corporate limits of the City and some within the extended but illegal limits of the City, severally entitled to intervene and show that the "plan" because of its bad faith, its unfairness, its waste of public funds and its illegalities should not be confirmed?

In response to this question counsel for respondent, pages 17 and 18, rely upon a district court decision in *In re Willacy County Water Control & Imp. Dist.*, 36 Fed. Supp. 36. That case cannot help respondents even if

it was a Court of Appeals decision, because there were two sets of land owners who sought to intervene. The first set, namely, Coats *et al.*, sought to intervene and attack in its entirety the corporate existence of the taxing district and to attack *in toto* the validity of all the bonds issued by the district. The court held that the intervention would not be permitted because the petition therefor was without merit and because it was barred by provisions of the state law. That under the state law only the State acting through the Attorney General could make such an attack either upon the district or its bonds. The other set of land owners, as shown by the 11th and 12th headnotes and supporting text, were permitted to intervene because the court concluded that the "plan" would materially injure their rights. Therefore respondent can get no comfort out of the Willacy case.

Respondent's counsel have not undertaken to answer the general proposition represented by *Crampton* v. *Zabriskie*, cited page 18 of our petition to the effect that any taxpayer always has a standing in a court of equity to complain and have relief against corporate authorities to prevent waste of corporate assets or an abuse of corporate power or the making of illegal contracts that purport to bind the taxing corporate entity. In this connection we find further aid in the second paragraph of U. S. C. A., Sec. 403(a). That part of the statute expressly provides that where the plan of composition affects special assessments levied against particular properties a list of the owners shall be filed with the petition

> "and such record owners or holders of title shall be notified in the manner provided in this section for creditors and be entitled to hearing by the court upon reasonable application therefor."

The obvious reason for that provision is that the liens against the lands of such abutting owners constitute a

> "special statutory trust"

as declared by the Supreme Court of Florida in the Winter Haven case quoted page 23 of our petition. Such abutting owners whose properties are thus encumbered are entitled to be heard as to how that fund is to be appropriated and used in the proposed plan. Section 8 of the proposed plan here involved (R. 21) does that very thing, namely, it proposes to illegally divert that fund to uses not authorized by the statute constituting the charter of the City providing for the levying of such special assessments. True it may be that no one of the intervening property owners set up specifically that he was such abutting property owner subject to such special assessments. Nevertheless the statutory provision cited is only one example of the manner in which property owners in the City may be affected and hence be entitled to a hearing. Another example is represented by the case of *Taylor* v. *Williams,* 142 Fla. 402, 195 So. 175. In that case a group of taxpayers filed a suit in equity attacking the validity of county and road district bonds previously issued and validated by a prior court decree. Part of the attack had to do with a so-called fiscal agency contract theretofore entered into with R. E. Crummer & Company which increased the burdens represented by the bonds under attack. The Supreme Court of Florida found certain parts of that refunding contract and the basic resolutions of the County Commissioners relating thereto void and contrary to Section 6, Article IX, of the State Constitution. Said the Supreme Court:

> "Such provisions being organically illegal are not made valid by validating proceedings and the taxpayer may challenge such organic invalidity."

In the instant case the petitioners, all taxpayers now before this court as petitioners, pointed out the same sort of illegalities in the refunding bonds which were to constitute a part of the composition plan and the same sort of illegalities in the fiscal agency contract made with Thomas M. Cook. Therefore they had a perfect right under the

decision in *Taylor* v. *Williams* to intervene pursuant to Rule 24 of Civil Procedure Rules and have their attacks considered by the court. Instead, they were summarily dismissed by the district court and its decision was affirmed.

As another example we cite the case of *Hughes* v. *Town of Davenport,* 141 Fla. 382, 193 So. 292. In that case Hughes and other taxpayers of the Town of Davenport filed a suit in equity to enjoin taxes levied against their lands. The situation there was a close parallel to what the petitions of these taxpayers here undertook to present. The Hughes case was also a close parallel with the record made in the companion suit of *Selser* v. *City of Stuart,* No. 314, now pending here. In a prior quo warranto suit similar to *State* v. *City of Stuart,* 120 So. 335, a judgment of ouster had been entered excluding certain territory from the corporate limits of the town. Nevertheless the town authorities continued to levy taxes on the excluded area on the theory that such area was bound to respond for debt service on bonds issued under the Special Act of 1925 prior to the judgment of ouster. The Supreme Court of Florida held in the first place that former validation proceedings with respect to such bonds did not determine what lands were within the corporate limits subject to the payment of the bonds. That whenever it was determined by the quo warranto suit that the lands in question were not legally within the corporate limits, such lands were not subject either for past or future assessments for debt service purposes. In the instant case, as shown by the pleadings of the landowning petitioners here and as shown by the bill in the Selser case, the City notwithstanding the judgment of ouster in *State* v. *City of Stuart,* continued to levy taxes on the excluded areas and the City secured special acts at the 1937 session and the 1939 session of the Legislature undertaking to confirm and ratify the levies so made in such outlying territories. The plan which was presented

to the court below, especially section 8 thereof, contemplates and provides that delinquent taxes against all such areas may be collected and then utilized to buy back refunding bonds from Thomas M. Cook at the prices stated in that section of the plan. Thus again the properties of these intervening property owners and the properties owned by others in all such areas are directly involved in this plan and the pretended liens against their properties are a part of the very subject-matter which the plan of composition purports to pledge for the support of the new bonds. The Supreme Court of Florida in the Hughes case squarely held that such taxpayers and property owners were entitled to attack such a scheme by a bill in equity. Therefore the inescapable conclusion that they were entitled by petition of intervention to be heard in this proceeding. It is a mandatory requirement of 11 U. S. C. A, Sec. 403(e), that the court shall not only find that the plan is fair and equitable and that it complies with the provisions of that chapter of the Bankruptcy Law but also that

> "The petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan."

This last clause makes it obligatory upon the court to hear and determine the various questions of illegality presented by the petitions of the land owners now before the court including the illegal attempt to pledge taxes against their lands for the payment of the new bonds.

The amendment to the Municipal Bankruptcy Provisions came under review and was sustained by this court in *U. S.* v. *Bekins,* 304 U. S. 27, 82 L. Ed. 1137. The amended act was sustained on the ground that unlike the first Act, it preserved and did not interfere with the fiscal or governmental affairs of the states or their political subdivisions. The court also specifically held as shown by the 4th headnote (L. Ed.) and supporting text that the clause now found in 11 U. S. C. A., Sec. 403(e)(6),

"manifestly refers to the law of the state."

It follows therefore that when a proposed plan of composition such as now before the court includes a proposal to substitute refunding bonds for all outstanding bonds and judgments against the City the responsibility is placed upon the bankruptcy court to ascertain and determine whether or not the proposed refunding bonds are authorized by state law, including the statute which constitutes the charter of the City. Substantially the same situation was before the Ninth Circuit Court of Appeals in the case of *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, *supra*. In that case proceedings were already pending in the state courts of California for a composition of the bonded indebtedness of the irrigation district in accordance with the rules defined by the state law. Nevertheless it was held as pointed out in the 5th, 6th, 16th and 17th headnotes and supporting text that whenever the Bankruptcy Court accepted the petition of the district and the required number of its creditors for federal composition the jurisdiction of the Bankruptcy Court thereupon became exclusive. This means, when coupled with the decision in the Bekins case just mentioned, that the Bankruptcy Court had exclusive jurisdiction to determine whether the composition plan was legal and to determine the legality of proposed refunding bonds, but in reaching such determinations the court must have regard to the powers vested in the taxing entity under state law and under the state constitution. Under Question XI, pages 35 to 38 of our petition, we pointed out that the exclusive character of federal jurisdiction precluded the prosecution of a validation suit with respect to the proposed new bonds in a state court during and while the bankruptcy proceeding was in progress. The decision in the Merced Irrigation District case certainly sustains that proposition. Nevertheless the state statute dealing with the subject of validating bonds again aids in determining when property

owners should be entitled to intervene in a composition proceeding such as this. Section 5107, Compiled General Laws of Florida, 1927, being a part of the statute relating to the validation of bonds, expressly provides that upon the filing of a petition to validate a notice addressed to taxpayers and citizens of the taxing entity shall be duly published stating the time and place for a hearing and requiring them to show cause

> "if any they have why said bonds or certificates should not be validated and confirmed."

All the taxpayers and citizens of the City of Stuart had the same interest in this composition plan which included a proposal to issue over one million dollars of refunding bonds in lieu of all outstanding bonds and judgments that they would have had if the validation proceeding had been properly brought in the state court. Nevertheless the district court and the Court of Appeals held otherwise and struck all pleadings interposed by the property owners who are now petitioners before this court.

We may also point out that the last amendment to 11 U. S. C. A., Sec. 403(e), now found in the pocket supplement page 88, makes it imperative that the court guard against fraudulent practices. Property owners of any affected taxing entity are most vitally interested in preventing fraudulent practices such as the statute sought to guard against and hence that constitutes another strong reason why they should be permitted to intervene and aid the court in ferreting out fraudulent practices if any are attempted.

The provisions of 11 U. S. C. A., Sec. 403(e), were designed to forestall and prevent any such fraud being perpetrated upon the public. On page 17 of the brief for respondent two prior decisions of the Fifth Circuit are cited in support of the argument that the jurisdiction of the Bankruptcy Court in proceedings of this sort is very limited. Neither of those cases has any application. The

Ware case, 128 Fed. 2d 114, simply held that when the proposed plan of composition failed the Bankruptcy Court had no further jurisdiction and therefore could not order any distribution of municipal funds that might have been accumulated while the proposed plan of composition was pending. The same thing was held in the Leco Properties case. Such holdings are probably correct applications of the statute but even so they do not answer the contention here made on behalf of creditors and property owners as applied to a proposed plan which was not abandoned but which the court undertook to approve and confirm.

QUESTION III.

Was the plan "fair and equitable" either to creditors such as Green et al., or taxpayers such as Turner et al., when it was shown by the answer of Green (R. 95) **that the citizens' committee plan** (R. 98 to 108) **would have accomplished a refunding of the City's debts for $500,000 less than the Cook-Crummer plan** (R. 13-33)?

The respondent stands mute as to this question. No attempt is made to deny or explain what was said in the answer of Green (R. 95) as to there being a difference of a half million dollars between the Citizens' Committee plan and the Cook-Crummer plan. It needs no argument to show that such very great difference in the result of the two plans is a matter which vitally concerns both the minority creditors and property owners of the City whoever they may be.

The record also shows (pages 86 to 91) that petitioner Green through his counsel propounded a set of interrogatories to the Mayor of the City of Stuart, among them the following:

> "(5) Please state how it is for the better interests of the taxpayers you refuse to proceed under an accepted plan that will lessen the municipal debt some $500,000?

"(24) Please state if Thomas M. Cook or his employees did not state Cook & R. E. Crummer controlled the City debt and unless they or Cook were permitted to handle the refunding no plan would be approved.

"(25) State that as a matter of fact you were afraid that if you didn't allow Cook to handle the refunding it could not be accomplished."

"(33) If this plan costs the City $500,000 more than your first accepted plan, how do you arrive at the conclusion it is of no cost to the City, or does it cost the City $500,000 and put Cook in a position to demand a large fee as a condition to exchange."

A similar set of interrogatories was propounded to the fiscal agent Thomas M. Cook (R. 139 to 142). No. 13 (R. 141) was as follows:

"(13) Please state how you arrive at the conclusion your plan of composition is at no cost to the petitioner when it costs the petitioner some $500,000 more than its own accepted plan."

The courts below did not welcome any light on these questions. At any rate the record shows that the claim and answer of Green and other petitioners here were stricken out and that the court did not require any answers to the above quoted interrogatories or any others propounded to the Mayor and Cook. The pleadings of the petitioners which were stricken out by the orders of the district court and the unanswered interrogatories warrant the inference that there was *coercion* exercised by Crummer and his representative Cook in forcing the fiscal agency contract and their refunding program on the City. Also that they used the provisions of the Bankruptcy Act as a club to get what they wanted from the City and from minority creditors. Also that they used the proceedings in the bankruptcy court to put over their plan and enable them to make large profits in speculating upon the securities of the City. The Municipal Bankruptcy

Act was not enacted for any such purposes. On the contrary this court in *U. S.* v. *Bekins,* 304 U. S., text 51, 82 L. Ed., text 1144, quoted the report of the Judiciary Committee to the effect that one of the purposes of the Act was to enable financially embarrassed taxing entities

> "to meet their creditors under necessary judicial control and guidance and *free from coercion* and to affect such adjustment on a plan determined to be mutually advantageous" (Italics ours).

This general purpose of the Act was reinforced and further safe-guarded by the amendment of March 4th, 1940, now found in 11 U. S. C. A., Sec. 403 (e), pocket supplement, page 88. It follows therefore that the courts below committed grievous error in closing the door against such inquiries.

QUESTION IV.

Was the City "authorized by law to take all the action necesary to be taken by it to carry out the plan" when that plan was contrary to many limitations of the City's existing charter?

The brief for respondent is silent also as to this question. Counsel does not pretend to claim that the City had power to issue over $1,000,000 of refunding bonds without any ordinance and without any election when the City Clerk's affidavit shows that the entire assessed value of all the taxable property the City *claims to be subject* to taxation amounts to only about $650,000 more than the bonded debt. We have already called attention to *U. S.* v. *Bekins,* 304 U. S., text 49, to the effect that 11 U. S. C. A. 403(e)(6) means that the composition plan must be in accordance with state law and that means in this instance in accordance with the City's statutory charter. This court in the Avon Park case emphasized the same proposition for in the last paragraph of the opinion in that case, 311 U. S. 149, referring to the section of the Statute last mentioned, the court said:

"the court must be satisfied that the city 'is authorized by law to take all action necessary to be taken by it to carry out the plan' before it may enter a decree of confirmation. Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds or the levy of assessments therefor."

QUESTION V.

Was the City "authorized by law" to carry out the plan when the provisions of Section 8 of the plan (R. 21-22) **violated sundry sections of the City's charter of 1925 and of the City's charter of 1933?**

The brief for respondent is silent as to this question.

QUESTION VI.

Was the plan either "fair and equitable" to petitioning creditors and taxpayers or was the plan "authorized" by the City's charter when it was proposed to convert into interest-bearing bonds all noninterest-bearing bonds all noninterest-bearing coupons and "other interest" but to allow the holders of 25% in amount of refunding bonds to cause a reverter to the old interest rate of 6% upon any default by the City occurring, such refunding bondholders however to retain all interest-bearing new bonds issued for noninterest-bearing coupons and "other interest"?

The brief for respondent contains no comment whatsoever on this question. It simply asserts that the findings of the courts below close the door on all such inquiries and that neither creditors nor property owners had any right to be heard or to raise any of the questions presented by the petition for writ of certiorari. The discussion under Question VI presented by the petition shows that the Cook-Crummer plan operated to *increase* the bonded indebtedness of the City greatly over what the face thereof previously showed because they put into the form of interest-bearing bonds a large accumulation of

non-interest-bearing coupons and then compounded the interest on the coupons. This was part of the means whereby the difference of $500,000 arose between the Citizens' Committee plan and the Cook-Crummer plan. Such method of increasing the bonded indebtedness of the City was prohibited not only by the rule quoted from the Fieldhouse case, page 25 of the petition, but also by the limitations contained in Section 158 of the City's charter quoted page 20 of our petition.

QUESTION VII.

Was the district court authorized to confirm the plan without any specific findings as to the City's ability to perform and carry out the plan and without any investigation or findings as to what property was subject to taxation, especially when these petitioners had their pleadings sought to put such matters in issue?

The brief for respondent is silent as to this question. They do not even make any comment with respect to the case of *Kelley* v. *Everglades Drainage District,* 87 L. Ed. (adv.) 1091, although that case was decided since the decision by the Court of Appeals now under consideration. They assume that the City and its consenting creditors consisting of the Crummer outfit had only limited use for the power of the Bankruptcy Court. Apparently all they wanted was to secure a confirmation order to the end that they might be able to speedily market the refunding bonds at a big profit on the representation that they had the full approval of the federal bankruptcy court. The position which their argument takes is that if taxpayers have any complaint as to the lands levied upon for those new bonds or as to the illegality of the fiscal agency contract or as to any lack of power under the City charter or otherwise they are privileged to start such litigation as they see fit in the state court whereas under the law as explained in *U. S.* v. *Bekins* and in the Avon Park case and in the Kelley case the Bankruptcy Court cannot ac-

cept the responsibility of such a case and do the job by halves leaving a Pandora's Box of litigation to follow. In the case of *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 679, first column, it appears that a scientific study of the taxpaying ability of the irrigation district was made and that the study represented about nine months of intensive work, whereas in this case the courts below refused to make any inquiry of that sort and refused to entertain any pleadings by creditors or property owners which would go into that subject.

QUESTION VIII.

Was it competent for the district court to confirm the plan when illegal favoritism appeared on the face of the plan and when "fraudulent practices" on the part of the fiscal agent Cook (representative of R. E. Crummer & Company) were shown by the petitioners' pleadings and the contract attached to the petition of Van Tassel (R. 167 to 177)?

The only even indirect attempt to answer this question is the general statement of alleged distortion of facts and gratuitous statement of facts found in the first sentence of respondent's brief plus the alleged inflammatory and highly untrue and prejudicial matters complained of bottom page 19, but even in closing (top page 20) they say they will not attempt to answer such matters. We assume that they may have some reference to something said in support of Question VIII of the petition but if so they studiously avoided pointing out definitely what their complaint is based upon. The observations in support of Question No. VIII contained in the petition are based upon the record and the places of the record are cited with respect to each matter. It seems to us that if a speculating bond-house concern can get away with such a program as put over with respect to the City of Stuart then Congress has failed in its purpose of trying to safe-

guard honest composition plans for financially embarrassed public entities.

QUESTIONS IX AND X.

Was the plan accepted and approved by qualified creditors holding two-thirds of the debts affected?

Was the offer and acceptance of the plan in good faith?

No comment is made in the brief for respondent as to these two questions.

QUESTION XI.

Did the district court as a court of bankruptcy have exclusive jurisdiction and power to consider and determine all questions relating to the proposed plan of composition, including what property was subject to ad valorem taxation and whether the proposed refunding bonds would be valid and enforceable obligations?

This question was presented pages 35 to 38 of the petition heretofore filed. We have since the filing of the petition in this case filed a reply brief in *Selser et al.* v. *City of Stuart*, Case No. 314. The Selser case has to do primarily with the subject-matter of Question XI above stated. We respectfully refer the court to the reply brief in the Selser case as supplementing and supporting the observations made in the petition with respect to Question XI.

In the further support of the point that it was incompetent for the City to prosecute the validation proceeding of the proposed refunding bonds in the state court while the proceeding for composition of its indebtedness was pending in the federal court, we again cite *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654 (9 C. C. A.), certiorari denied 311 U. S. 718, 5th, 6th, 15th and 17th headnotes and text supporting the same. The validity and the authority of the City to issue such refunding bonds

was part of the very subject-matter over which the federal court then had jurisdiction pursuant to 11 U. S. C. A., Sec. 403(e)(6). The City had petitioned for an injunction against all actions brought against it and an injunction order had been granted to that effect. See petition (R. 209) and order (R. 215). That petition and order were filed and made upon the theory that the federal court had exclusive jurisdiction as to all matters relating to the plan or the proposed refunding bonds including the validity and power to issue said bonds.

Conclusion.

We find in the conclusion of respondent's brief the contentions repeated that creditors Green and Newport Culvert Company were in no manner affected by the composition proceedings. That contention has been answered by each and every one of the eleven questions presented by the petition and reviewed in this reply brief. They contend further that the property owners Pauline A. Selser, Gosling, Turner, Van Tassel and others were not affected by the composition proceedings and therefore not entitled to intervene, but that in any case they were represented by the City itself. That argument is wholly unsound as pointed out under the several questions hereinbefore discussed, especially so when it is pointed out that the City authorities were under pressure and coercion exercised by the Crummer-Cook majority group of bondholders. If the City or any other such taxing unit represented the taxpayers making it improper for them to intervene in such a case then the whole theory of such statutes as the Florida statute on the subject of validating bonds and providing notice to property owners who may come in and defend is all wrong. Again, such cases as Hughes v. *Town of Davenport, supra*, are all wrong. Also *Taylor* v. *Williams, supra*. Again it is claimed in the conclusion of respondent's brief that the position of all the petitioners is not changed in any manner except that they are now better off than before. This is a barefaced assertion with-

out any support from the record and it is contrary to all of the specific observations pointed out in the petition and in this brief to the contrary under the several Questions I to XI inclusive.

We have examined the several cases cited bottom page 15 of respondent's brief and so far as we can tell they have no relevancy to this question or to any other contention made in this case. The only possible benefit that can be claimed for the City is a temporary reduction in interest rates, whereas that benefit, according to section (F) of the plan (R. 18) and according to section 5 (2) of the fiscal agency contract (R. 172) has a 25 percent-option string tied to it, and according to the record the Cook-Crummer outfit holds that string. The net result, according to the record is that the City now has a very much larger bonded debt than it had before, with no increased ability to pay. Therefore the City and its property owners and general creditors have gained nothing, whereas the fiscal agent and those with whom he is associated have gained much by the speculations permitted.

It is now respectfully submitted that the questions presented by the petition in this case and reenforced by this brief are of great public importance in the matter of the proper construction and application of that part of the Bankruptcy Act which relates to municipal corporations. If the municipal amendment to that Act is to perform the remedial purposes designed by Congress the matters complained of in this case should be corrected.

Respectfully submitted,

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(13)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 313

GEORGE W. GREEN, ET AL.,
Petitioners,

vs.

CITY OF STUART, FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

THOS. B. ADAMS,
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CITY OF STUART, FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Your petitioners, George W. Green, Newport Culvert Company, a Kentucky corporation, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser, Mary M. Gosling and George W. Van Slyck, as executor of the Estate of B. N. Douglass, deceased, severally respectfully petition the court for a rehearing upon the Order and Judgment of this Honorable Court made and entered October 18th, 1943, denying their petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and

respectfully submit the following matters for the court's consideration in that behalf:

1. The effect of the denial of Writ of Certiorari in this cause is to leave in force, in Florida and throughout the jurisdiction of the Fifth Circuit, the rules of decision set forth in *Green* v. *City of Stuart,* 135 Fed. 2nd 33, thereby nullifying at least in said area the rules of decision laid down by this Court in *American Union, etc., Ins. Co.* v. *Avon Park,* 311 U. S. 158, and *Kelley* v. *Everglades Drainage District,* 87 L. Ed. (adv.) 1091.

2. In the *Avon Park* case this Court recognized the right of a creditor, no more adversely affected by the plan than these creditors Green and Newport Culvert Company, to be heard in opposition to the "plan", yet here such creditors depending upon "the same source" for payment, were completely shut out without any hearing whatsoever. Their claims and answers were entirely stricken. Under the rule announced by the Court of Appeals only a bond creditor or a judgment creditor was entitled to be heard with respect to the several aspects of the proposed "plan", whereas the Statute makes no such classification and instead classifies creditors according to the "source" of payment. If the decision of the Court of Appeals is not corrected much confusion will result in the application of the Statute not only in the Fifth Circuit but in other circuits such as the Ninth Circuit where a contrary rule has heretofore prevailed. *West Coast Life Ins. Co.* v. *Merced Irr. Dist.,* 114 Fed. 2d 654, 14th headnote.

3. The so-called fiscal agency contract granted to Thomas M. Cook, representative of R. E. Crummer & Company (R. 168 to R. 177) was equally as vicious and contrary to law, both Federal and State, as was the so-called fiscal agency contract granted to R. E. Crummer & Company in the *Avon Park* case. If neither general creditors of the

City of Stuart nor its property owners can be heard to question the illegalities of such a contract forming an integral part of the "plan" then the benefit and effect of the *Avon Park* case has been largely dissipated.

4. The interlocutory decree of September 18th, 1942, (R. 155 to R. 163) made no findings as to the ability of the City of Stuart to pay or as to what constituted its legal and available resources. Neither was any evidence submitted to the court in that behalf. Instead the court had no evidence as to any matter except two *ex parte* affidavits, one by L. B. Eurit, City Clerk (R. 150), and the other by Thomas M. Cook, the so-called fiscal agent (R. 152). In the *Kelley* case it was clearly held that the Statute made it incumbent on the court to require the submission of proper evidence as to the resources of the taxing unit and then to make appropriate findings as to such resources and ability to pay. To leave the decision of the district court and the decision of the court of appeals uncorrected on this subject will make uncertain of application the rules of law declared in the *Kelley* case not only in the Fifth Circuit but in other circuits.

5. The stricken pleadings of general creditors and property owners filed in this cause showed the existence of many evils and "fraudulent practices" which the amendment to the Bankruptcy Act of March 4th, 1940 (11 U. S. C. A., Section 403(e)) sought to forestall and prevent. If general creditors of the City and property owners of the City cannot be heard to complain of such "fraudulent practices" in proceedings brought by the City for the confirmation of such a plan as here involved then it would seem that the amendment of 1940 was in vain and that a bankruptcy court may be made the "handmaid of iniquity."

6. In *United States* v. *Bekins*, 304 U. S. 27, and in the *Avon Park* case, 311 U. S. text 149, this Court laid down

the rule that there should be no confirmation of the "plan" unless the taxing entity is "authorized by law (state law) to take all action necessary to be taken by it to carry out the plan", whereas by the petition for writ of certiorari filed in this cause and by the brief supporting the same the petitioners have pointed out how the City Charter of the City of Stuart, the State Constitution and decisions of the Supreme Court of the state demonstrate the invalidity of the bonds involved in the proposed plan. The question therefore recurs: Were general creditors of the City and its property owners entitled to be heard for the purpose of pointing out such illegalities, especially when the plan meant a new bonded indebtedness of $500,000 more than the Citizens' Committee plan previously accepted by the City Commissioners? The English Magna Carta of 1215 said:

> "To no one will We sell, to none will We deny or defer, right or justice."

The Fifth Amendment speaks the same language. We respectfully submit that the petitioners in this cause were not accorded the rights thus guaranteed.

Wherefore the petitioners respectfully request that reconsideration be given to the petition for certiorari filed in this cause and that the same be granted.

Respectfully submitted,

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